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## Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis<sup>∞</sup>

By Maria Dicosola,<sup>\*</sup> Cristina Fasone,<sup>\*\*</sup> & Irene Spigno<sup>\*\*\*</sup>

### A. Are Constitutional Courts the “Most Disparaged Branch” in the EU Constitutional System?

When debating the constitutionalization of EU law, different views emerge regarding the role of Constitutional Courts. Some scholars see these Courts as the institutions that, since the 1970s, have marked turning points in the construction of the European legal system, thanks to their case law on the protection of fundamental rights, democratic principle, and constitutional “counter limits”. Constitutional Courts have provided and can provide invaluable inputs into the activity of the European institutions, particularly to the Court of Justice of the European Union (CJEU), so as to reconcile the national and the supranational.<sup>1</sup>

According to other scholars, however, Constitutional Courts can be seen as “the most disparaged branch” in the process of European integration, very often criticized for their

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<sup>∞</sup> The articles published in this *Special Issue* have been selected, presented, and discussed on the occasion of the call for papers and the conference on *The preliminary reference to the Court of Justice of the European Union by Constitutional Courts*, held at LUISS Guido Carli University in Rome on 28-29 March 2014 in memory of Gabriella Angiulli, a PhD candidate who worked on this topic at LUISS University and at the University of Siena. The organization of the conference was possible thanks to the funds kindly provided by the Center for Parliamentary Studies, LUISS Guido Carli University, and the invaluable support of Carmela Decaro, Tania Groppi, Nicola Lupo, Enzo Moavero Milanesi and the contribution of the invited speakers: Thomas Beukers, Raffaele Bifulco, Eleonora Ceccherini, Jean-Philippe Derosier, Filippo Donati, Solange Fatal, Daniele Gallo, Janek Tomasz Nowak, Alice Pisapia, Oreste Pollicino, and Robert Schütze.

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<sup>1</sup> See Marta Cartabia, *Europe and Rights. Taking Dialogue Seriously*, 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 5, 23-29 (2009); Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 83, 95-129 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed., 2011).

EU-related judgments, even if they are probably the institutions whose authority has been challenged most since 1957.<sup>2</sup> National executives have certainly been the institutions who gained most in terms of powers and visibility in the EU; at the same time, while national parliaments have traditionally been depicted as the main losers in the European inter-institutional game, their role has been partially rehabilitated by the Treaty of Lisbon, not to mention ordinary judges, who have gained substantial powers thanks to European integration and who are in charge of the daily enforcement of EU law. The marginalization of Constitutional Courts in EU integration is partly attributable to structural principles of EU law, like primacy and direct effect, along with the implementation of European human rights law, not always in line with national constitutional provisions, and thus to elements beyond the original control of the Courts themselves. Constitutional Courts have never been formally involved in EU Treaty-making (although in many countries these Courts have been involved in checking the compliance of Treaty revisions with national Constitutions), and nor has there ever been a top-down mechanism of preliminary reference from the CJEU to Constitutional Courts or national judges in place.<sup>3</sup>

On the other hand, many Constitutional Courts have, thus far, failed to engage in a “structured” conversation with the CJEU, by far the most active engine of the development of EU law. Ordinary judges have become the most important interlocutors of the CJEU through the preliminary reference procedure (Article 267 TFEU) and hence have provided the CJEU with the most significant opportunities to deliver its judgments; this is not certainly the case of most Constitutional Courts in Europe. Out of 18 Constitutional Courts in the EU, only 9 have resorted to preliminary reference.<sup>4</sup>

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<sup>2</sup> The expression “most disparaged branch” – in opposition to the image of the US judiciary as the “least dangerous branch” depicted by Alexander Bickel in 1962 – has been drawn from the title of a symposium held at the Boston University School of Law on 14-15 November 2008, on “The Most Disparaged Branch: The Role of Congress in the Twenty-First Century” then published by the Boston University Law Review. Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUROPEAN CONSTITUTIONAL LAW REVIEW, 420, 421 (2013), has recently pointed to the problem of the threat coming from EU law for the supremacy of Constitutional Courts by quoting the words of the President of the Czech Constitutional Court, Pavel Rychetský. Very similar concerns can be inferred from the reports published on the website of the XVIth Congress of the Congress of European Constitutional Courts, available at <http://www.confeconstco.org/en/common/home.html>.

<sup>3</sup> See Joseph H.H. Weiler, *European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order*, XLIV POLITICAL STUDIES, 517, 532-533 (1996); Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this Special Issue.

<sup>4</sup> Member States with Constitutional Courts, by which it is meant institutions established outside the judicial branch *ad hoc* for carrying out constitutional review of legislation, are: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. They follow the Kelsenian ideal of the concentrated model of constitutional review. In this regard, although Portugal has a mixed model of constitutional review of legislation, the Portuguese Constitutional Court does play a centralized role insofar as all decisions of ordinary judges declaring an act unconstitutional are usually appealed against before the Constitutional Court by the Public Prosecutor. The Maltese Constitutional Court, in spite of the name, is part of the judiciary. The Constitutional Courts that have used the preliminary reference procedure are those of: Austria, Belgium, France, Germany, Italy, Lithuania, Poland, Slovenia, and Spain.

It must be noted, however, that even if Constitutional Courts do not use Article 267 TFEU, for years they have been involved in a more informal dialogue with the CJEU and with constitutional judges of other Member States, for example through the Conference of European Constitutional Courts or through regular meetings for exchanging views and best practice.<sup>5</sup> By the same token, the mere fact of making a preliminary reference to the CJEU does not imply that we witness a friendly use of this device by the Constitutional Court in question.<sup>6</sup>

To some extent, the caution displayed by most Constitutional Courts towards engaging in a formal and open dialogue with the CJEU is not only understandable but also reasonable. Constitutional Courts are not courts like others. Constitutional Courts had only been recently established – compared to century-old institutions, like legislatures, governments and ordinary courts – entrusted with the role to enforce new and rigid Constitutions when, either at the beginning of the process of European integration or following subsequent accessions, they were forced to start managing EC/EU law. They did not have time to consolidate as new institutions shaped within each national constitutional system when they were called to apply a body of law that could potentially challenge the autonomy of their own Constitutions.

Constitutional Courts are enabled to perform a specific task within the national constitutional landscape – namely constitutional review of national legislation.<sup>7</sup> Because of their close relationship with the legislative branch, the validity of whose action they are called to assess, and due to their composition and appointment structures, Constitutional Courts are particularly sensitive to political issues. Furthermore, since these Courts are empowered to oversee compliance with fundamental and supreme constitutional principles, they are guardians of the constitutional identity of a polity. It is unavoidable that their activity is deeply rooted in a specific national context.

The CJEU represents a potential threat to the legitimacy of Constitutional Courts as well as to their very special jurisdiction. This is by no means explicitly acknowledged by the CJEU,

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<sup>5</sup> See Maartje De Visser & Monica Claes, *Courts United? On European Judicial Networks*, in *LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD* 79-80, 75 (Antoin Vauchez & Bruno De Witte, eds., 2013).

<sup>6</sup> See Giuseppe Martinico, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this *Special Issue* and Franz C. Mayer, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It*; Dagmar Schiek, *The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure?* 15 *GERMAN LAW JOURNAL – Special Issue, OMT* (2014).

<sup>7</sup> MAARTJE DE VISSER, *CONSTITUTIONAL REVIEW IN EUROPE – A COMPARATIVE ANALYSIS* 53-74, 93-154, and 205-222 (2013).



which deals with these courts as if they were ordinary courts of last resort.<sup>8</sup> With its claims for primacy, for uniform implementation, and for the unity of EU law, the CJEU challenges the very assumption on which the work of Constitutional Courts is based.

Nevertheless, while constitutional conflicts between the CJEU and Constitutional Courts are probably unavoidable, their relationship has very often been a cooperative one. To this purpose, the reference to the common constitutional traditions of the Member States by the CJEU, now enshrined in Article 6 TEU, is a sign of openness towards Constitutional Courts. Likewise, the “message of war” occasionally launched by some Constitutional Courts through the weapon of the “counter limits” doctrine has never been turned into a proper nuclear attack.<sup>9</sup>

### B. The Rise of Preliminary References by Constitutional Courts

There are many reasons as to why the past six years can be depicted as a period of deep constitutional transformations. This should drive scholars to investigate whether and how the preliminary reference by Constitutional Courts has undertaken crucial developments in the formal and substantive European Constitution, by which we mean both national constitutional law and EU constitutional law.<sup>10</sup> Given this ongoing transformation, how can the role of Constitutional Courts be assessed? Is it possible to find a common trend among Constitutional Courts towards EU law? Can their recent case law be seen as a sign of their protagonism or of their marginalization?

First of all, there is quantitative evidence. From 2008 to date, the number of Constitutional Courts issuing preliminary references has doubled. The Constitutional Courts of France, Germany, Italy – EU founding Member States –, Poland, Slovenia, and Spain have joined the club.<sup>11</sup> Second, there are qualitative elements – such as the entry into force of the Eastward enlargement, the Treaty of Lisbon and the Euro-crisis – that push towards a

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<sup>8</sup> See Enzo Cannizzaro, *Rinvio pregiudiziale e Corti costituzionali nazionali*, in SCRITTI IN ONORE DI GIUSEPPE TESAURO, 819 (2014). Even from a procedural point of view, when it was necessary to ascertain the priority between the preliminary reference to the CJEU and the *question prioritaire de constitutionnalité* (QPC), it was the former that prevailed over the latter: see Joined Cases C-188/10 and C-189/10, Melki and Abdeli, 2010 E.C.R. I-05667. See also Case C-409/06, Winner Wetten, 2010 E.C.R. I-08015 and Case C-416/10, Križan, (Jan. 15, 2013), <http://curia.europa.eu/>.

<sup>9</sup> By contrast, in Italy the “counter limit” doctrine has recently been used by the Constitutional Court against international law: see decision no. 238/2014 of 22 October 2014.

<sup>10</sup> See ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 1-8 (2012).

<sup>11</sup> The Constitutional Court of Italy issued its first preliminary reference to the CJEU in an incidental proceeding in 2013 (order no. 207/2013), while in 2008 the preliminary reference was issued in a *principaliter* proceeding. See Giorgio Repetto, *Pouring New Wine Into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, in this *Special Issue*.

reconfiguration of the preliminary reference's rationale. The first group of elements is united by the time. Indeed, one can wonder why national Constitutional Courts embedded within the EU legal system for almost sixty years have decided only now to change their mind on the preliminary reference, thus eventually recognizing themselves more or less explicitly as courts of last resort (Article 267(3) TFEU).

### *I. A Matter of "Time"*

#### *1. The Entry into Force of the Treaty of Lisbon and the Charter of Fundamental Rights*

The period in question is characterized by at least two "constitutional moments": the entry into force of the Treaty of Lisbon and the Euro-crisis.<sup>12</sup> The Treaty of Lisbon entered into force on 1 December 2009, and has in itself triggered many changes. For example, the formal incorporation of the Charter of Fundamental Rights into EU primary law has given rise to a debate about the potential expansion or limitation in the protection of rights.<sup>13</sup> The reference by the Spanish Constitutional Court in the *Melloni* case, and the saga of the *Data Retention Directive*, which ended up with annulment by the CJEU upon the preliminary references by the Irish High Court and the Austrian Constitutional Court,<sup>14</sup> are significant examples.

Similarly, the new national identity clause (Article 4(2) TEU), although never invoked by a Constitutional Court as the main standard to adjudicate the validity of EU law or in seeking the correct interpretation of EU law by the CJEU, is certainly a contested issue.<sup>15</sup> The questions of what is inside and what is outside the national identity of a Member State, of who is entitled to decide, and of whether such a clause will increase constitutional conflicts

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<sup>12</sup> BRUCE A. ACKERMAN, *WE THE PEOPLE*. FOUNDATIONS 307 (1993).

<sup>13</sup> See Anneli Albi, *Erosion of constitutional rights in EU law: A call for "substantive co-operative constitutionalism"*, 9 VIENNA JOURNAL OF INTERNATIONAL CONSTITUTIONAL LAW (forthcoming 2015). In this *Special Issue* see Ludovica Benedizione & Eleonora Paris, *Preliminary Reference and Dialogue between Courts as Tools for the Reflection on the EU Multilevel Protection of Rights. The case of the Data Retention Directive*; Andreas Orator, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*; Miryam Rodríguez-Izquierdo Serrano, *The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference*. In particular, since 2012 the Austrian Constitutional Court has recognized the Charter of Fundamental Rights as a standard for constitutional review of national legislation implementing EU law (VfSlg 19.632/2012, Decision U 466/11-18 and U 1836/11-13, of 14 March 2012). The English translation of the judgment is available at [https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta\\_english\\_u466-11.pdf](https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf).

<sup>14</sup> Case C-399/11, *Melloni*, (Feb. 26, 2013); Case C-293/12, *Digital Rights Ireland*, (Apr. 8, 2014), <http://curia.europa.eu/>.

<sup>15</sup> The clause has been used, however, by other courts, like the Austrian Supreme Administrative Court in the order for a preliminary reference to the CJEU in Case C-208/09, *Sayn-Wittgenstein*, 2010 E.C.R. I-13693.

or not remain unresolved.<sup>16</sup> What cannot be neglected is that since 2009, the clause forms part of the Treaties and is sometimes invoked in the case law of Constitutional Courts as a potential leeway against the EU's most 'oppressive' measures and judgments.<sup>17</sup>

Moreover, the Treaty of Lisbon has further enlarged EU competence in criminal law, particularly as regards judicial cooperation in criminal matters. As the troublesome implementation of the Framework Decision on the European Arrest Warrant (EAW) has already proved, this field is one of the most sensitive for Constitutional Courts; the Czech, the German, and the Polish Constitutional Courts have, amongst others, warned about the recourse to "counter limits" against the EAW Framework Decision.<sup>18</sup> Further expansion of EU law in this domain could trigger a reaction by Constitutional Courts and a more active use of the preliminary reference procedure in the future, as is indicated by the first case of a preliminary reference by the French *Conseil constitutionnel*.<sup>19</sup>

Finally, the Treaty of Lisbon has opened the door to EU accession to the ECHR (Article 6(2) TEU). Should the EU accede to the ECHR, despite the CJEU's Opinion 2/13,<sup>20</sup> this would add complexity to the existing legal framework of the judicial dialogue between Constitutional Courts and European Courts. In some Member States, the already challenging relationship between Constitutional Courts and the CJEU is perhaps even more contentious when

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<sup>16</sup> For example, while some authors see the new identity clause as a cooperative tool between the European and national levels of government. See Barbara Guastaferrro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, YEARBOOK OF EUROPEAN LAW 263 (2012); Armin von Bogdandy & Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MARKET LAW REVIEW 1417 (2011). Others do not share the view that the identity clause will necessarily support a process of "pacification" in the relationship between the CJEU and national courts. See also FRANÇOIS-XAVIER-MILLET, L'UNION EUROPÉENNE ET L'IDENTITÉ CONSTITUTIONNELLE DES ÉTATS MEMBRES (2013); Giuseppe Martinico, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this *Special Issue*.

<sup>17</sup> See *Lisbon* judgment of German Constitutional Court, Second Senate, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Judgment of 30 June 2009; the English translation is available at [https://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html). However, even in the only case in which a decision of the CJEU has been declared *ultra vires* by a Constitutional Court - Pl. ÚS 5/12: Slovak Pensions of 31 January 2012 -, the Czech Constitutional Court did not make any reference to Art. 4(2) TEU and to the national identity clause. Indeed this decision has been described as "an unmeasured and poorly-reasoned response to a domestic conflict between the Constitutional and Supreme Administrative Court" rather than a "declaration of war against the CJEU." See Jan Komárek, *Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires*, 8 EUROPEAN CONSTITUTIONAL LAW REVIEW, 323 (2012).

<sup>18</sup> See MARTINICO, *supra* note 6.

<sup>19</sup> See Jeremy F. Case, Decision n. 2013-314P QPC, of 4 April 2013; François-Xavier Millet & Nicoletta Perlo, *The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?*, in this *Special Issue*. The role of the CJEU in criminal matters, however, is subject to limitations; for example, the CJEU cannot rule on the validity of police operations under EU law (Art. 276 TFEU).

<sup>20</sup> Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), <http://curia.europa.eu/>.

looking at constitutional judges vis-à-vis the European Court of Human Rights, because of the lack of direct interaction between them akin to that provided by the preliminary reference procedure. In this regard, at least at first sight, the prospective EU accession appears to have adapted the model of the preliminary reference procedure both to the relationship between the European Court of Human Rights and the CJEU, when the EU is a co-respondent and the CJEU has not yet had the opportunity to assess the compliance of EU law with the ECHR and its protocols (Article 3(6) draft accession agreement);<sup>21</sup> and to the relationship between a Constitutional Court and the European Court of Human Rights through the mechanism of the advisory opinions (Article 1, Protocol no. 16 to the ECHR).<sup>22</sup> Although the combination of prior involvement and advisory opinion mechanism has been considered by the CJEU as a challenge to the EU preliminary reference procedure, the need to accommodate the trilateral relationship between Constitutional Courts, the CJEU and the European Court of Human Rights solicits the setting up of new mechanisms that could improve the quality – in terms of stability and effectiveness – of the interplay amongst courts placed at different levels of government in the European constitutional system.

## 2. The Euro-Crisis

The second “constitutional moment” providing an input for a more active use of the preliminary reference procedure is the Euro-crisis. Unconventional legal measures – “new form of law”<sup>23</sup> – have been adopted in reaction to the Eurozone crisis, driving Constitutional and Supreme Courts to question their compliance with existing EU Treaties, like the Treaty on the European Stability Mechanism (ESM) and the Outright Monetary Transactions (OMT) programme announced by the European Central Bank. The latter pushed the German Constitutional to issue its first ever preliminary reference to the CJEU on 7 February 2014.<sup>24</sup> By contrast, the validity of the ESM was assessed by the CJEU in the *Pringle* case, upon referral by the Irish Supreme Court.<sup>25</sup> Other Constitutional Courts – the Austrian, the German, and the Polish ones – decided not to make a reference to the CJEU. The urgency and complexity of the mechanisms behind the operation of the ESM and the announcement of the OMT have proved to be a valuable test for the use of the preliminary

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<sup>21</sup> See Francesco Cherubini, *The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession*, in this Special Issue.

<sup>22</sup> See Maria Dicosola, Cristina Fasone, & Irene Spigno, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights. A First Comparative Assessment with the European Union and the Inter-American System*, in this Special Issue.

<sup>23</sup> See Samo Bardutzky, *Constitutional Courts, Preliminary Rulings and the “New Form of Law”: The Adjudication of the European Stability Mechanism*, in this Special Issue.

<sup>24</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13. See the judgment of the CJEU on this referral, Case C-62/14, *Gauweiler and Others*, (June 16, 2015), <http://curia.europa.eu/>. See also the Special Section: *The CJEU’s OMT Decision*, 16 GERMAN LAW JOURNAL (2015).

<sup>25</sup> Case C-370/12, *Pringle*, (Nov. 27, 2012), <http://curia.europa.eu/>.

reference procedure by Constitutional Courts and of their different reactions in spite of the desirability of judicial dialogue in this field.<sup>26</sup> Last but not least, on 6 November 2014, the setting up of the Banking Union, an inherent part of the EU constitutional response to the Euro-crisis, triggered the first preliminary reference by the Constitutional Court of Slovenia on the EU Commission's "Banking Communication".<sup>27</sup>

## *II. A Matter of "Space"*

The second element that leads us to reconsider the tool of the preliminary reference to the CJEU is space. The reference in the EU Treaties to the ECHR, not only with regard to EU accession, but first of all with regard to the protection of rights, has forced us to rethink the virtual boundaries of EU law. The fact that fundamental rights, as guaranteed by the ECHR, 'shall constitute general principles of the Union's law', according to Article 6(3) TEU, implies that the relationship between Constitutional Courts and the CJEU must be placed within the broader context of the Council of Europe and of the European Court of Human Rights' case law, in spite of the EU territory.

Moreover, the space that constitutes the point of reference for embarking on the Article 267 TFEU procedure on the part of Constitutional Courts was extended even prior to the Treaty of Lisbon. Whilst in 1957 only two Member States had established Constitutional Courts, over the years constitutional reforms and accessions to the EU have brought about an increase in the number of Constitutional Courts established. From 2004 to 2007, the EU Eastward enlargement brought 11 new Constitutional Courts into the European legal space, thus expanding the "club" of EU Constitutional Courts that can potentially make a preliminary reference to the CJEU and, in turn, the variety of constitutional traditions.

The fact that none of these new Constitutional Courts, but the Constitutional Courts of Lithuania<sup>28</sup>, Slovenia<sup>29</sup> and, recently, in July 2015, Poland,<sup>30</sup> have yet used the preliminary

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<sup>26</sup> See Editorial Comments, *An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and the Member States' highest courts*, 51 COMMON MARKET LAW REVIEW 375 (2014).

<sup>27</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis ("Banking Communication"), OJEU C216/1, 30 July 2013. See the Slovenian Constitutional Court's case, Case U-I-295/13, Order of reference of 6 November 2014 (still pending before the CJEU, Case C-526/14, Kotnik and Others) and the comment by Samo Bardutzky, *The first preliminary reference to the Court of Justice of the EU by the Slovenian Constitutional Court: the case of the Commission's Banking Communication*, available on the CONSTITUTIONAL CHANGE TROUGH EURO-CRISIS LAW website (2015), at <http://eurocrisislaw.eu.eu/news/the-first-preliminary-reference-to-the-court-of-justice-of-the-eu-by-the-slovenian-constitutional-court-the-case-of-the-commissions-banking-communication/>.

<sup>28</sup> *Lietuvos Respublikos Konstitucinis Teismas* case, decision no. 47/04 of 8 May 2007.

<sup>29</sup> Constitutional Court of Slovenia, Case U-I-295/13, of 6 November 2014 (note 27).

reference device should not necessarily be regarded as an issue of concern. While some of them, for example in the Czech Republic and Romania, have occasionally shown some hostility towards EU law and the CJEU, they are relative newcomers in the EU and have had to cope first with challenges that their colleagues in the Old Europe have had decades to deal with, like building up their legitimacy, defining the status of EU law in constitutional review of legislation, and tackling the conflict between the primacy of EU law and the supremacy of the Constitution after the regained independence from the Soviet Union.<sup>30</sup> Nonetheless, that Central and Eastern European Courts share the same concerns as other EU Constitutional Courts was confirmed by the cases of the *EAW* and the *Data Retention Directive*. The latter case illustrates quite clearly that while the preliminary reference is not yet an option for these Courts, the authority of the CJEU is accepted. Thus, for instance, while the decision on the constitutionality of the Data Retention Directive's implementing measures was pending before Constitutional Courts, awaiting the preliminary decision of the CJEU (finally delivered on 8 April 2014), the Constitutional Court of Slovenia opted to suspend its judgment and the Constitutional Court of Slovakia decided to postpone its ruling until after the CJEU had its final word.

### C. The Need to Improve the Quality of the Preliminary References and the Preliminary Rulings

Some of the abovementioned transformations, in particular those deriving from the Treaty of Lisbon, are likely to affect the content of the orders for preliminary reference addressed to the CJEU. For example, while questions on interpretation have traditionally been much more frequent than those on validity, the entry into force of the Charter of Fundamental Rights has made the referral of questions of validity more likely, as indicated by the CJEU landmark judgments in the *Pringle* and in *Data Retention* cases.

Indeed, crucial elements to compare are the nature of the preliminary questions referred by Constitutional Courts as against those coming from ordinary judges, with consideration of whether there are any significant variations, and, if so, their content, and taking into

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<sup>30</sup> Constitutional Court of Poland, Case K 61/13, of 7 July 2015; the Case C-390/15 is pending before the CJEU. The preliminary reference originated from a constitutional complaint filed by the Polish Human Rights Defender (Ombudsman) because the tax regime on ebooks – if compared with that on normal books – was suspected to violate the constitutional principle of tax equality (Art. 32 of the Polish Constitution). At the same time, since the contested tax legislation on ebooks aimed to implement the Council Directive 2006/112/EC, on the common system of value added tax, the Polish Constitutional Court asked the CJEU whether this Directive was invalid as for how the legislative procedure for its adoption had been carried out (first preliminary question) and/or because it violates the principle of tax neutrality (second preliminary question). See Aleksandra Kustra, *Reading the Tea Leaves. The Polish Constitutional Tribunal and Preliminary Ruling Procedure*, in this *Special Issue*.

<sup>31</sup> WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 45-90 (2014).

account also constitutional case law dealing indirectly with EU law. In other words, from the preliminary references of Constitutional Courts, as well as from what these Courts purposely omit to do or say, it is possible to get a clearer picture of how constitutional judges perceive themselves in their dialogue with the CJEU. What has been substantially overlooked so far is the different attitudes shown by Constitutional Courts using the preliminary reference tool. Indeed, the mere fact that 9 Constitutional Courts have applied Article 267 TFEU as referring judges does not mean that they do so in like manner. The reasoning applied, the number, the frequency and the nature (interpretation or validity) of references, as well as the fields in which a preliminary reference is issued can make a difference. The attitude of the Constitutional Courts depends on the strategy they pursue, for instance as regards the message they want to send to ordinary courts via a preliminary reference procedure.

The quality of the preliminary references issued by Constitutional Courts could be improved through a process of mutual learning in which Constitutional Courts and the CJEU consider how to make their dialogue more effective. Increased effectiveness here means both enhancing the clarity of the questions raised and reducing, as a consequence, the workload of the CJEU by means of “pilot judgments”<sup>32</sup> – in addition to keep on applying the long standing *CILFIT* doctrine.<sup>33</sup> By receiving a lower number of preliminary questions, but ones which are more carefully drafted and which provide the CJEU with viable solutions to the case, the CJEU would be enabled to focus on the most relevant and new issues. At the same time, the input for these “pilot judgments” should come from Constitutional Courts. For if Constitutional Courts were willing to set the path for CJEU judgments on the constitutional substance of EU law (e.g., on the protection of fundamental rights and the enforcement of the Charter), with these in turn being followed by ordinary judges, then there could be positive outcomes for both Constitutional Courts and the CJEU. Constitutional Courts could thereby break the almost exclusive relationship between ordinary judges and the CJEU, from which they have voluntarily remained at the margins; the CJEU, meanwhile, would be asked to judge a lower number of cases, but with these cases being of greatest constitutional significance. The CJEU would, moreover, be judging these cases on the basis of a set of possible answers already provided by Constitutional Courts.

For a long time, the CJEU has advocated the use of a “green light procedure” when dealing with preliminary questions.<sup>34</sup> This procedure allows for swift conclusion of the case. It

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<sup>32</sup> See Koen Lenaerts, *The Unity of European Law and the Overload of the CJEU – The System of Preliminary Rulings Revisited*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 211, 212 (Ingolf Pernice *et al.*, eds., 2005).

<sup>33</sup> Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. 03415.

<sup>34</sup> See CJEU, Information Note on references from national courts for a preliminary ruling, OJ C 143/1 of 11 June 2005, para. 23, and CJEU, Information Note on references from national courts for a preliminary ruling, OJ C 297/1 of 5 December 2009, para. 23; more recently the Recommendations of the Court of Justice of the European

means that when the referring court drafts a preliminary question, it also foresees an answer to it, to which the CJEU can, if it agrees, simply give a “green light”. If the CJEU does not agree with the proposed answer, then it should provide detailed explanations and reasons as to why alternative solutions are necessary.

Whilst the use of the “green light procedure” is not mandatory, it is recommended as an option to establish a mutually beneficial dialogue between the CJEU and national courts.<sup>35</sup> A good illustration of a constructive use of this procedure was the referral of the Spanish Constitutional Court in the *Melloni* case in 2011.<sup>36</sup> On that occasion, the Constitutional Court offered the CJEU many different and possible interpretations. It offered also what could appear as the preferred solution: the interpretation of the Framework Decision on the EAW in conformity with Article 24 of the Spanish Constitution and the right to defence, which could prevail over the protection offered by Articles 47 and 48 of the EU Charter. This proposed interpretation was, however, disregarded by the CJEU in the name of the primacy and the unity of EU law.

By contrast, an example of uncooperative, if not coercive, use of the “green light procedure” by a Constitutional Court is provided by the German Constitutional Court’s referral to the CJEU on the OMT. The German Constitutional Court offered a pre-packed solution to the CJEU:<sup>37</sup> it seems that either the CJEU had to buy the German Constitutional Court’s interpretation of EU law or it is considered to act *ultra vires* by the German Constitutional Court likewise the ECB has been accused to do.<sup>38</sup> This testifies that what appears to be an inherently cooperative mechanism, like the preliminary reference procedure, can be used in many ways, and can even be turned into an instrument of conflict. This requires a careful assessment of the implications that stem from different

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Union, to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 338/1 of 6 November 2012, para. 24. The proposal for using the ‘green light procedure’ has also been supported in a Report by the Association of the Councils of State and of the Supreme Administrative Jurisdictions of the EU in 2007, available at [http://www.iuradmin.eu/seminars/DenHaag2007/Final\\_report.pdf](http://www.iuradmin.eu/seminars/DenHaag2007/Final_report.pdf). See Daniel Sarmiento, *Amending the Preliminary Reference Procedure for the Administrative Judge*, 2 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 29, 34 (2009). Even the European Parliament “urges consideration of a «green light» system.” See the European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system, para. 31.

<sup>35</sup> MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE COURT OF JUSTICE OF THE EUROPEAN UNION 28 (2nd ed. 2014) (Pointing out that there are many different forms of “green light procedure,” up to the point of allowing the referring Court to send a draft judgment to the CJEU that becomes final after a certain time limit.).

<sup>36</sup> Although not the follow up of the CJEU decision. See RODRÍGUEZ-IZQUIERDO SERRANO, *supra* note 13.

<sup>37</sup> See Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”*, 15 GERMAN LAW JOURNAL – Special Issue, OMT 343, 344 (2014).

<sup>38</sup> It remains to be seen what will be the reception of the CJEU judgment, Case C-64/12 (note 24) by the German Constitutional Court in its final decision expected in December 2015.



modes of handling Article 267 TFEU.<sup>39</sup>

#### D. The Background and Content of the Special Issue

Whilst the topic of preliminary references to the CJEU by the highest jurisdictions is certainly not new,<sup>40</sup> a comprehensive study of its management by Constitutional Courts of the EU Member States in the current period of 'constitutional turbulence' is lacking. These issues would have been addressed by Gabriella Angiulli in her PhD dissertation entitled *The preliminary reference to the Court of Justice of the European Union by Constitutional Courts*,<sup>41</sup> which unfortunately she did not have the opportunity to complete. Hence, in her memory and with a view to keeping her contribution alive and developing her research further, a conference on the topic was organized at LUISS Guido Carli University in Rome on 28-29 March 2014, aiming to foster the scholarly debate on a topical, though often overlooked, subject-matter in European and constitutional law. The attempt of this *Special Issue* is to bring together expert scholars from different Member States on this matter in order to analyze the developments that have occurred in the case law of Constitutional Courts, the approach of these Courts in relation to the preliminary reference procedure, and the CJEU from the standpoint of national constitutional law in the light of the transformations that have occurred in the European constitutional system over the past few years.

The *Special Issue* is devised as follows. Following an introduction based on a comparative analysis of the status quo and the potential of the use of the preliminary reference by Constitutional Courts (Monica Claes), Part One is devoted to the multilevel system of constitutional adjudication in which Constitutional Courts are requested to act so as to include the national level, the EU, and the system of the ECHR. The analysis begins with an assessment of the role of the preliminary reference procedure in the hands of Constitutional Courts to cope with constitutional conflicts (Giuseppe Martinico), proceeds to focus on the relationship between the CJEU and the European Court of Human Rights in view of the accession (Francesco Cherubini), and ends with a comparison of the role of

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<sup>39</sup> Monica Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in this *Special Issue*.

<sup>40</sup> THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter, Alec Stone Sweet and Joseph H.H. Weiler eds., 1998); MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006); GIUSEPPE MARTINICO & ORESTE POLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS (2012); CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES (Monica Claes, Maartje De Visser, Patricia Popelier et al. eds., 2013).

<sup>41</sup> Gabriella Angiulli, *Il rinvio pregiudiziale alla Corte di giustizia dell'Unione europea da parte dei Giudici costituzionali degli Stati membri*, available at [http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA\\_Scuola\\_dottorale\\_in\\_-\\_Diritto\\_-ed\\_-economia.pdf](http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA_Scuola_dottorale_in_-_Diritto_-ed_-economia.pdf) (2011).

Constitutional Courts in the prospective advisory opinion mechanism before the European Court of Human Rights, the preliminary references procedure in the EU, and the advisory opinion mechanism of the American Convention on Human Rights (Maria Dicosola, Cristina Fasone, and Irene Spigno).

Part Two of the special issue is devoted to long-standing or (newly) stabilized relationships between the CJEU and Constitutional Courts. It presents assessments of the cases of Austria (Andreas Orator), Italy (Giorgio Repetto), and France (François-Xavier Millet & Nicoletta Perlo).

Part Three deals with Constitutional Courts that have referred preliminary questions to the CJEU and that pose the most challenging questions in terms of how to conceive of their constitutional role in the EU. This challenge may arise because of the subject matters covered and the way the referral has been managed, as in the case of the German Constitutional Court (Eva Lohse), the Spanish Constitutional Court (Miryam Rodríguez-Izquierdo Serrano), and the Polish Constitutional Court (Aleksandra Kustra), the latest newcomer in the cohort of referring Courts, on the very sensitive issue of taxation for the EU-Member States relationships. Or it may stem from the contested institutional role undertaken, and irrespective of whether this role could be fully compared to a Constitutional Court or not, as in the case of the UK Supreme Court (Alessia Fusco).

Part Four analyzes the cases of Constitutional Courts that have not yet issued a preliminary reference to the CJEU, but whose “silence” on this point is equally telling about the approach they adopt. It is particularly so if it is read in the light of the case law of these courts on the primacy of EU law and on those providing alternative solutions and explanations to the referral of preliminary questions. The Constitutional Courts considered in this Part are those of Hungary (Fruzsina Gárdos-Orosz), Bulgaria (Mihail Vatsov), and Romania (Viorica Viță).

Part Five includes a series of comparative analyses of how Constitutional Courts perceive their role in the “dialogue” with the CJEU (Pierre-Vincent Astresses) and on their use of the preliminary reference procedure in crucial sectors. These areas include the challenging relationship between these Courts and ordinary highest Courts (Clelia Lacchi), the Data Retention Directive (Ludovica Benedizione & Eleonora Paris), and the ESM Treaty (Samo Bardutzky).

In the final paper, new questions about the use of the preliminary reference tool by Constitutional Courts are put forward and lead to a depiction of “Europe” as a space of constitutional interdependence (Marta Cartabia).



## Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure

By Monica Claes\*

### A. Introduction

As is well known, Constitutional Courts have for a long time been reluctant to use the preliminary reference procedure and to “engage in a formal dialogue” with the European Court of Justice (CJEU).<sup>1</sup> Several explanations have been put forward for this reluctance, some of which have been found in legal arguments, others in behavioral factors. The initial refusal of the Italian, French, and Spanish Constitutional Courts is illustrative of the former type of arguments. The Italian *Corte costituzionale* has, for a while, denied that it qualified as a ‘court or tribunal’ in the sense of the Treaties, since it exercised special functions of constitutional review, guaranteeing that the Constitution was observed by the Italian state and sub-state bodies and institutions.<sup>2</sup> Similarly, the French *Conseil constitutionnel* most likely did not consider itself an ordinary court of European law, given its peculiar position in the French legal order and its atypical competences to review legislation only a priori and outside any case or controversy. In addition, the *Conseil* acts under very short and strict time limits, which for a long time excluded any references to the CJEU. Its conception of a strict division between its responsibilities (to review the *constitutionnalité* of legislation) and those of the ordinary courts (to review their *conventionnalité*) made it highly unlikely

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<sup>1</sup> I will here use the notion of “Constitutional Court” in a limited sense, referring only to those specialized “kelsenian” courts that have been established with a view to reviewing the constitutionality of primary legislation, and excluding those highest or supreme courts that have jurisdiction to review questions of constitutionality, in addition to their function of supreme court of legality, such as the Irish *Supreme Court*, the Cypriot *Supreme Court* or the Danish *Højesteret*, even though they too are members of the Conference of European Constitutional Courts. In the EU, the following courts qualify: the Austrian *Verfassungsgerichtshof*, the Belgian *Cour constitutionnelle*, the Bulgarian constitutional court, the Croatian *Ustavni sud*, the Czech *Ústavní soud*, the French *Conseil constitutionnel*, the German *Bundesverfassungsgericht*, the Hungarian *Köztársaság Alkotmánybírósága*, the Italian *Corte costituzionale*, the Latvian *Satversmes tiesa*, the Lithuanian *Konstitucinis Teismas*, the Luxembourg *Cour constitutionnelle*, the Polish *Trybunał Konstytucyjny*, the Portuguese *Tribunal Constitucional*, the Romanian *Curtea Constituțională*, the Slovakian *Ústavný súd*, the Slovenian *Ustavno Sodišče*, and the Spanish *Tribunal Constitucional*, totaling a number of 18 specialized constitutional courts, or possibly 19 if one includes also the Maltese Constitutional Court. Interestingly, the Conference of European Constitutional Courts has admitted in 2014 the Dutch *Hoge Raad*, which does *not* have jurisdiction to review the constitutionality of primary legislation.

<sup>2</sup> See *Corte costituzionale*, decision 13/1960 of 16 March 1960 and decision 536/1995 of 29 December 1995.

that it would make a reference. The same argument has been put forward in the context of the Spanish *Tribunal constitucional*, which has always left EU law to the ordinary courts, whilst concerning itself only with reviewing the constitutionality of Spanish laws.

The behavioral explanations are usually concerned with allegations of “judicial ego”,<sup>3</sup> “judicial jealousy”, and of courts being protective of their own position of “highest court” of the land.<sup>4</sup> Constitutional Courts have supposedly been reluctant to make use of the procedure, because making a reference implies a voluntary subjection to the authority of an external court, given that it must be presumed that the sender of the question will consider itself bound by the answer. That is the consequence of playing by the rules.<sup>5</sup> Constitutional Courts would avoid such a situation. Instead, some of them have insisted that ordinary courts act on their obligation to make references, with some even making it a constitutional obligation. The German *Bundesverfassungsgericht*, for instance, made it a breach of the constitutional right to a lawful judge for a highest German court not to make a reference without explanation. As a result, making references and engaging with the CJEU was a constitutional obligation imposed on the other courts, not on the Constitutional Courts.

For a long time, Constitutional Courts could thus stay out of the game, but at the same time, they had to watch the ordinary courts apply EU law and engage with the CJEU.<sup>6</sup> Engaging with EU law and with the CJEU comes with the mandate to review national law and makes all courts review courts, thus empowering them. Ordinary courts become competitors to Constitutional Courts. Sometimes, lower courts have used EU law and the preliminary reference procedure to challenge decisions of higher domestic courts,

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<sup>3</sup> Famously, see Joseph H.H. Weiler, *Editorial: Judicial Ego*, 9 INT’L J. CONST. L. 1, 1–4 (2011).

<sup>4</sup> Of course, the CJEU has on several occasions exhibited similar signs of a tendency to jealously guard its competences and of “judicial ego”, as most recently in Opinion 2/13 on accession to the ECHR (Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), <http://curia.europa.eu/>). See generally Bruno De Witte, *A selfish Court? The Court of Justice and the design of international dispute settlement beyond the European Union*, in THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW—CONSTITUTIONAL CHALLENGES 33 (Marise Cremona & Anne Thies eds., 2013).

<sup>5</sup> It is obvious that what the *Bundesverfassungsgericht* did in its referral on the *OMT*, reserving the right not to follow the decision of the CJEU and declare the *OMT* not applicable in Germany, even if the CJEU would save the decision under EU law, is in clear breach of the system as set out in the Treaties.

<sup>6</sup> This has not been the case for those supreme courts that have jurisdiction to conduct constitutional review, such as the Irish *High Court*, *Court of Appeal* and *Supreme Court* or the Danish *Højesteret*, or for highest courts that, while not having jurisdiction to review the constitutionality of national law strictly speaking, come close substantially, such as the UK *Supreme Court*, the Estonian *Riigikohus* or the Dutch *Hoge Raad* and *Raad van State*. They do regularly make references including also on questions that could be termed “constitutional”, such as fundamental rights issues.

including also Constitutional Courts.<sup>7</sup> For a long time, however, EU law was for the most part not concerned so much with the main business of Constitutional Courts, such as fundamental rights protection or complex societal issues, but rather with free movement and technical issues of economic law. During that time, an “unofficial” division could accordingly be made between the business of Constitutional Courts and that of EU law. With the entrance of EU law into fields that used to be those of Constitutional Courts, especially fundamental rights, this became more and more problematic, since it meant that Constitutional Courts could become sidelined in their own core business. This is particularly evident in the cases of France and Belgium, be it that in those countries, the competition between the Constitutional Courts and the ordinary supreme courts (*Cours de cassation* and *Conseils d’État*) over the final say in the area of fundamental rights protection mostly concerned the ECHR and the Constitution.

This should not be taken to mean that national constitutional issues never reached Luxembourg: they were often referred by ordinary courts, as in *Internationale Handelsgesellschaft*, *Simmenthal*, *Michaniki*, *Landtová*, or *X, Y, Z v Staatssecretaris van Veiligheid en Justitie* and many more.<sup>8</sup> After all, it is not only Constitutional Courts that are confronted with “constitutional issues.”

The above should also not be taken to mean that Constitutional Courts have had no business at all with EU law. Quite on the contrary: While they may have left the routine application of EU law to the ordinary courts, they have played a key role in designing the European legal space, in regulating the relations between the national and the European legal orders, and in addressing the more systemic legal and constitutional issues of European integration. This role of the Constitutional Courts can be further sub-divided into a number of different and sometimes competing roles that they play within the overall European legal space.<sup>9</sup> First, Constitutional Courts have facilitated the process of European legal integration, by allowing for accession and for the ratification of European Treaties, and by anchoring European law within the national legal order. In doing so, they have often had to develop new conceptions of the relations between national and international law, to reinterpret old concepts such as sovereignty to adapt to the circumstances of

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<sup>7</sup> A recent example of the latter situation is the reference made by the Czech Highest Administrative Court in the Slovak pensions case, leading to the *Landtová* decision of the CJEU: Case C-399/09, *Landtová*, 2011 E.C.R. I-5573. On the feud between the Czech courts and the involvement of the CJEU therein see Michal Bobek, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, 10 EUR. CONST. L. REV. 54, 54–89 (2014).

<sup>8</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125; Case 106/77, *Simmenthal*, 1978 E.C.R. 629; Case C-465/11, *Michaniki*, 2012 E.C.R. 801; Case C-399/09, *Landtová*, 2011 E.C.R. I-5573; Case C-148/13, C-149/13 and C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, 2014 E.C.R. 2406.

<sup>9</sup> This point is further developed in Monica Claes & Bruno De Witte, *The Role of National Constitutional Courts in the European Legal Space*, THE ROLE OF COURTS IN A CONTEXT OF MULTI-LEVEL GOVERNANCE 79–104 (Patricia Popelier, Armen Mazmanyan, & Werner Vandenbruwaene eds., 2012).

membership, and to make it possible for EU law to be applied directly and with priority over conflicting national law. In many cases, the Constitutional Courts have convinced the ordinary courts to accept their European mandate to apply EU law, even if this has entailed a shift in their traditional constitutional position.<sup>10</sup> In this respect, therefore, Constitutional Courts can be said to have been “Euro-friendly” and cooperative with the CJEU.

Second, Constitutional Courts have also contributed constructively to the constitutionalization of Europe, by feeding the principles and values of constitutionalism into EU law, thus acting as catalysts for rather than as obstacles to European integration. Constitutional Courts have thus contributed to the development of a “common European constitutional heritage”, most conspicuously in the area of fundamental rights protection. According to common wisdom, the CJEU developed its fundamental rights jurisprudence on the instigation of the German and Italian Constitutional Courts, who were unwilling to unconditionally accept the primacy of European law as long as the EU did not have an adequate system of fundamental rights protection of its own. While this line of *Solange* and “*contro limiti*” cases<sup>11</sup> has often been interpreted as Euro-skeptic, on a broader view of the constitutionalization of Europe as developing European constitutionalism, national Constitutional Courts should be seen as the CJEU’s natural allies, rather than its enemies. European courts and national Constitutional Courts share the responsibility of protecting fundamental rights and basic principles and values against governments, political institutions, and the administration. Together, they are the guardians of the values of constitutionalism in Europe.

Third, and despite the friendly picture just painted, Constitutional Courts do still retain their constitutional mandate to uphold the Constitution: to defend the values of constitutionalism as laid down in the *national* Constitution, to protect the rights of individuals under the *national* Constitution, and for some, to protect the State and statehood itself, as well as the sovereignty, identity, and primacy of the *national* Constitution. In other words, these courts do not, on this view, act to protect ‘constitutionalism’ itself, but rather a particular version and form thereof: *national* democracy, *national* fundamental rights, the *national* perception of what the limits of European integration are and should be, and the *national* version of what should be essential to the national society. This has led them to develop various doctrines imposing

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<sup>10</sup> Take, for example, the French *Conseil constitutionnel* convincing the *Cour de cassation* and the *Conseil d’État* that the review in the light of EU law did not amount to a review of the constitutionality and was therefore something they could, and should, do under the (re-interpreted) French Constitution; or the decision of the German *Bundesverfassungsgericht* accepting, without any hesitation and despite the dualist traditions, that the ordinary German courts could directly apply EU law, thereby even setting aside conflicting national law, even if this meant that they would challenge the monopoly formerly held by the *Bundesverfassungsgericht*.

<sup>11</sup> *Bundesverfassungsgericht* [BVerfG] [Federal Constitutional Court], 29 May 1974, BVerfGE 37, 271 [hereinafter *Solange I*]; 22 Oct. 1986, 16 BVerfGE 73, 339 [hereinafter *Solange II*]; *Corte costituzionale*, Sentenza of 18 December 1973, n. 183/73, *Frontini*.

limits on the effect of EU law in the domestic legal order, typically in three main areas: fundamental rights review, competence review (*ultra vires* review) and, more recently, identity review and democracy review.<sup>12</sup> In this respect, the Constitutional Courts do challenge EU law and the CJEU's case law, which does not endorse such national and unilateral reservations to the application of EU law. And yet, it is mainly in these situations of possible constitutional conflict that Constitutional Courts have announced that should the day come that they will act on their retained jurisdiction to review EU law, they will make a reference for a preliminary ruling or will at the very least make sure that a reference is made by ordinary courts involved in the case. The *Bundesverfassungsgericht*, for instance, has recognised the primary role of the CJEU in the framework of fundamental rights protection and it has indicated that it would make a reference before declaring a measure *ultra vires*.<sup>13</sup> In the *Gauweiler* decision on Outright Monetary Transactions (OMT), it has acted on that promise.<sup>14</sup>

The relationship between national Constitutional Courts and the CJEU is thus a highly complex one that cannot be captured in a simple pro- or anti-European matrix, and should not be seen exclusively in terms of "conflict" or "cold war": Constitutional Courts and the CJEU are not simply pitted against each other. Moreover, the relationship between the CJEU and national Constitutional Courts is part of broader and highly complex political and legal dynamics and processes, with Constitutional Courts engaging with various actors at different levels: legislatures, parliaments, and governments, and various layers of government in systems of territorial division. The CJEU, in turn, engages with the European institutions and the Member States acting through their governments, as well as the parties to the cases brought before it, national institutions, and the wider audience.

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<sup>12</sup> According to Peter M. Huber, currently a member of the *Bundesverfassungsgericht*, the "democratic principle" and "the sovereignty of the people" have since the 1990s become the new Archimedic point of the German court's case law, as concerns over fundamental rights have decreased. In his view, "the concretization of the democratic principle by Article 20 (1) and (2) GG comprises two central ideas. First, the German concept of democracy substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (Article 20(1) and (2) GG) are based on the individual right to political self-determination which itself is based on human dignity (Article 1(1) GG). (...) Second, though based on the guarantee of human dignity in Article 1 (1) GG, which is applicable to every man and every woman, the *Grundgesetz* itself, as a constitution of a nation state and like most other European constitutions reserves – with some exceptions for EU citizens at the level of local communities – democratic participation to German citizens." And "the concept of democracy as described above is not only laid down in Art. 20(1) and (2) GG but it is part of the constitutional identity in terms of Art. 79(3) GG and therefore inalienable for the ordinary and the constitution amending legislator, as well as for the legislator in European affairs." It is obvious thus that the *Bundesverfassungsgericht* protects German democracy and German human dignity in its political form. See P. M. Huber, *The Federal Constitutional Court and European Integration*, 21 EUR. PUB. L. 83–108 (2015).

<sup>13</sup> *Solange II*, BVerfGE 73, 339 and Order of 7 June 2000, BVerfGE 102, 147 (*Bananenmarktordnung*); Order of 6 July 2010, BVerfGE 126, 286 (*Honeywell*). The *Bundesverfassungsgericht* has regularly spoken of a "*Kooperationsverhältnis*" with the CJEU.

<sup>14</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 14 January 2014, 2 BvR 2728/13.



More recently, Constitutional Courts have been considered as being “gradually marginalized” by the CJEU’s case law.<sup>15</sup> On this analysis, it is not national parliaments, but Constitutional Courts, who are the losers of European integration. Jan Komárek has even spoken of a “doctrine of displacement” of the CJEU, with national Constitutional Courts being removed from their place in constitutional law and politics, and with ordinary courts instead acting in cooperation with the CJEU. Komárek calls on national Constitutional Courts to be more cautious when accepting their “European mandate” too readily, as manifested in some recent decisions.<sup>16</sup> There may be some truth in this. But, as Komárek agrees in the end, it seems that ‘constitutionalism’ is best served when all actors *participate* in the process, including also Constitutional Courts who should refer questions for preliminary ruling to the CJEU. For instance, had the questions challenging the validity of the *Data Retention Directive* been referred to the CJEU earlier, so that it could have reviewed the directive in the light of fundamental rights, rather than Constitutional Courts limiting their review to the exercise of discretion left to the national institutions, would the CJEU not have had the occasion to declare the directive invalid a long time ago, to the benefit of our rights to privacy and data protection?<sup>17</sup>

## B. Talking to the European Court of Justice

As much as it requires nuance that Constitutional Courts have not engaged with EU law, it would be an overstatement to say that Constitutional Courts have not engaged at all with the CJEU. They have, but usually not by using the channel of the preliminary reference procedure. Rather, they have done so in their decisions, sending (sometimes) dark signals,

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<sup>15</sup> Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013); Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 INT’L J. CONST. L. 525 (2014). See Marc Bossuyt & Willem Verrijdt, *The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment*, 7 EUR. CONST. L. REV. 355 (2011); Anneli Albi, *Erosion of constitutional rights in EU law: A call for “substantive co-operative constitutionalism”*, 9 VIENNA J. INT’L CONST. L. (forthcoming 2015); Anneli Albi, *From the Banana saga to a Sugar Saga and Beyond: Could the Post-communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?*, COMMON MKT. L. REV. 791 (2012).

<sup>16</sup> KOMÁREK, *supra* note 15.

<sup>17</sup> Of course, the context has changed dramatically since then, but still. For a comment on the decision, see Orla Lynskey, *The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland, Joined Cases C–293 & 594/12, Digital Rights Ireland Ltd and Seitlinger and others, Judgment of the Court of Justice (Grand Chamber) of 8 April 2014*, nyr, 51 COMMON MKT. L. REV. 1789 (2014). On the Data Retention Directive before national Constitutional Courts, see Eleni Kosta, *The way to Luxembourg: national Court decisions on the compatibility of the Data Retention Directive with the rights to privacy and data protection*, 10 SCRIPTED 339 (2013); Ludovica Benedizione & Eleonora Paris, *Preliminary Reference and Dialogue between Courts as Tools for the Reflection on the EU Multilevel Protection of Rights. The case of the Data Retention Directive*, in this *Special Issue*. For a strong plea in favor of Constitutional Courts using the preliminary reference procedure to act as agents rather than recipients of the European constitutional construction, see Marta Cartabia, *Europe and rights: taking dialogue seriously*, 5 EUR. CONST. L. REV. 5 (2009).

expressing their expectations of the Court, and agreeing or disagreeing with the directions it has taken. The CJEU is very well aware of the case law of the Constitutional Courts, as the bulletin *Reflets*, produced by the Courts' DG Library, Research and Documentation, containing abstracts of decisions of Constitutional Courts (and other national courts as well as the ECtHR) clearly shows. Members of the CJEU regularly participate in the events of the Conference of European Constitutional Courts. There are regular visits from the CJEU to Constitutional Courts and vice versa. Members of Constitutional Courts and of the CJEU often take part in academic debates, as judges or as law professors, and meet at academic conferences or engage with each other in academic writings. And quite a few members of the CJEU have, before or after their appointment to Luxembourg, served as constitutional judges. So, it is fair to say that there is quite a bit of mutual engagement taking place. But what has been missing, and is still the exception rather than the rule today, is indeed the use of the preliminary reference procedure. With all its imperfections, the preliminary reference procedure offers a couple of unique qualities that "hidden" or "silent" dialogues do not. The procedure forces national courts to submit constitutional arguments to the CJEU, to make it more aware of constitutional sensitivities, and to urge it to argue its decisions carefully (or so one would expect). Moreover, and of no less importance, the use of the procedure brings hidden and informal conversations out into the open, to the benefit of constitutional deliberations and negotiations, both at the European level and nationally.

### C. Enter the Preliminary Reference Procedure

As is well known, the Belgian Constitutional Court was the first Kelsenian court to make a reference to the CJEU, and is until today by far the most regular user of the procedure, with twenty-six references to its name thus far.<sup>18</sup> That Court never seems to have made an issue of it: it merely assumed that it qualified as a court in the sense of the Treaties, and made its first reference in a case of limited constitutional importance.<sup>19</sup> Neither the CJEU nor its Advocate General made mention of the fact that it was a Constitutional Court making a reference; perhaps they even did not fully realize, given that the Constitutional Court still went under its old name of "court of arbitration." So, the Belgian Constitutional Court's entrance onto the preliminary reference scene was smooth and painless. Many

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<sup>18</sup> The website of the Constitutional Court has a special section on "preliminary references to the Court of Justice," which lists twenty-six references; the CJEU Annual Report 2013 counts twenty-eight references. The first references dates from 1997.

<sup>19</sup> The questions arose in the context of an annulment action against a decree of the Flemish Community relating to specific training in general medical practice, adopted primarily in order to transpose the provisions of Title IV of Council Directive 93/16/EEC of 5 April 1993 to the Flemish Community. The Constitutional Court asked about the correct interpretation of the directive, in order to be able to assess the issue of constitutionality, *Cour constitutionnelle* (Belgium), decision 6/97 of 19 February 1997, *Fédération Belge des Chambres Syndicales de Médecins ASBL v. Flemish Government, Government of the French Community, Council of Minister (Training in general medical practice)*.

explanations can be put forward as to this. It is a young and unpretentious Constitutional Court, which was established after the Belgian *Cour de cassation* had developed Belgian-style monism inspired by the European Court's *van Gend en Loos*, *Costa v. ENEL*, and *Simmenthal* case law.<sup>20</sup> The court was not, like, for instance, its counterparts in Italy, Germany, and France, involved in the "design phase." EU law was already considered to be part of the law of the land, and it was natural for the *Cour constitutionnelle* to apply it, both as a standard for review and as applicable law. In fact, given its initially restricted jurisdiction, applying EU and ECHR law implied an empowerment, at least as much as it had been for the ordinary courts. Participating in the application of EU law thus was a natural thing to do, and prevented the Court from being sidelined. Making references to the CJEU was the next logical step. This should not be taken to imply that the Belgian Constitutional Court "slavishly follows" Luxembourg, and makes references whenever EU law is involved; it carefully chooses its cases, applies the *CILFIT* doctrine to reject requests for references, and has at times refused to ask questions which may well have been called for under EU law.<sup>21</sup> The Court has asked questions on interpretation and validity alike, simply to be able to apply EU law correctly, or to challenge the validity of EU law (which could be together termed the "regular use of the procedure"). Sometimes, it has an ulterior motive, for instance to outsource tricky questions concerning sensitive societal and political issues which it is unable or unwilling to solve on its own.<sup>22</sup> But overall, the Court seems rather comfortable with the procedure.<sup>23</sup>

The Austrian *Verfassungsgerichtshof* has referred five preliminary references since 1999. Unlike the Belgian *Cour constitutionnelle*, it does not consider EU law to serve as a standard for its own constitutional review,<sup>24</sup> but in some cases it merely applies EU law.<sup>25</sup> In these instances, the *Verfassungsgerichtshof* considers itself bound by Article 267(3)

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<sup>20</sup> Case 26/62, *Van Gend en Loos*, 1963 English Special Edition, 1; Case 6/64, *Costa v ENEL*, 1964 English Special Edition, 1129; Case 106/77, *Simmenthal*, 1978 E.C.R. 629.

<sup>21</sup> See Elke Cloots, *Germes of pluralist judicial adjudication: Advocaten voor de Wereld and other references from the Belgian Constitutional Court*, 47 COMMON MKT. L. REV. 645 (2010).

<sup>22</sup> Cases in point are the *Flemish Care Insurance Case*, *Cour constitutionnelle* (Belgium), decision 51/2006 of 19 April 2006; Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand*, 2008 E.R.C. I-01683, and *Cour constitutionnelle* (Belgium), decision 2009/11 of 21 January 2009; and the *Libert* case, *Cour constitutionnelle* (Belgium) decision 49/2011 of 06 April 2011; Joined Cases C-197/11 and C-203/11, *Libert v Flemish Government*; *Cour constitutionnelle* (Belgium), 144/2013 of 7 November 2013.

<sup>23</sup> See also the report submitted by the Belgian *Cour constitutionnelle* to the XVth Congress of the Conference of European Constitutional Courts on Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives, available at [www.confconstco.org](http://www.confconstco.org).

<sup>24</sup> But see the recent position on the Charter, explained below.

<sup>25</sup> On the distinction between EU law as "standard of review" and EU law as applicable law, see Reinhard Klaushofer & Rainer Palmstorfer, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, EUR. PUB. L. 1 (2013).

TFEU.<sup>26</sup> In a 2012 asylum case, however, the *Verfassungsgerichtshof* held that all this was different for the EU Charter: unlike the rest of EU law, the Charter *is* a standard for its own constitutional review, as it would be inconsistent if the court that reviewed whether constitutional and ECHR rights were respected could not do so with respect to Charter rights.<sup>27</sup> In those situations too, the Court will, where appropriate, make preliminary references to the CJEU, but it will not do so if a constitutionally guaranteed right, especially an ECHR right, has the same scope of application as a Charter right. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without making a reference to the CJEU. So, despite the fact that the Austrian *Verfassungsgericht*, by purely numerical standards, seems to be one of the most cooperative Constitutional Courts,<sup>28</sup> and despite the praise it received from the former EU Commissioner for Fundamental Rights, Viviane Reding, its positions on the preliminary reference procedure and on the application of EU law and the Charter are at least questionable from an EU perspective.<sup>29</sup> In *A v. B and Others*, the CJEU corrected the *Verfassungsgericht* at the request of the Oberster Gerichtshof, confirming that ordinary courts must always be free to make a reference to the CJEU and that an obligation to first make a reference to the constitutional court violates EU law.<sup>30</sup>

The Lithuanian *Konstitucinis Teismas* (1 in 2007), the Italian *Corte costituzionale* (2, in 2008 and 2013),<sup>31</sup> the Spanish *Tribunal constitucional* (1 in 2011), the French *Conseil constitutionnel* (1 in 2013), the Slovenian *Ustavno Sodišče* (1 in 2013) and the German *Bundesverfassungsgericht* (1 in 2014, pending) have also made references. So whereas the Belgian and, to a lesser extent perhaps, the Austrian *Verfassungsgerichtshof*, make regular use of the procedure as it was designed in the Treaties, the other references are very recent and almost accidental. Some commentators have interpreted the recent references as the beginning of a new era of “real constitutional dialogue,” ending the reluctance of

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<sup>26</sup> See *id.* at 1–11; Andreas Orator, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, in this *Special Issue*.

<sup>27</sup> Austrian *Verfassungsgerichtshof*, 14 March 2012, U 466/11–18 and U 1836/11.

<sup>28</sup> Even though this is relative, of course the *Verfassungsgerichtshof* decides 5,000 to 6,000 cases per year.

<sup>29</sup> Viviane Reding, *Observations on the EU Charter of Fundamental Rights and the future of the European Union*, speech to the XXV Congress of FIDE, Tallinn, 31 May 2012.

<sup>30</sup> Case C–112/13, *A v B and Others*, 2014 E.C.R. I–2195

<sup>31</sup> *Corte costituzionale*, Order nos. 102 and 103 of 2008; Order no. 207 of 3 July 2013. On these cases see Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect (“Incidental”) Proceeding*, 20 EUR. PUB. L. 633 (2014); Giacinto Della Cananea, *The Italian Constitutional Court and the European Court of Justice: From Separation to Interaction?*, 14 EUR. PUB. L. 523 (2008); Filippo Fontanelli & Giuseppe Martinico, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, 16 EUR. L. J. 345 (2010).

Constitutional Courts towards European integration. This is often attributed to the new binding force of the EU Charter, which shifts the balance between the European courts, Constitutional Courts, and ordinary courts, and which forces Constitutional Courts to enter the arena in order to avoid being sidelined. So, is this a turning point? Are Constitutional Courts developing a new strategy, pushed by the entry into force of the Charter?

On closer analysis, it seems that what is happening is more mundane, and is rather a consequence of the ever-wider reach of EU law, and the particular circumstances of the relevant cases, rather than a revolutionary change of mentality of these courts. After all, there are still many missing players.<sup>32</sup> The change is more incremental, and almost accidental, but it does seem promising.

It is fair to assume that as a consequence of its scope entering the domain of fundamental rights protection, but also the fields of criminal law, asylum, sensitive societal and ethical questions, and the EU's actions to tackle the crisis, EU law has reached the "habitat" of Constitutional Courts more than before, and that it has become difficult for them to maintain their position of "splendid isolation." The unofficial division between "constitutionality" and "EU law" is no longer tenable. The entry into force of the Charter cannot, however, offer the sole plausible explanation. Some of the new referring courts made their first reference prior to the entry into force of the Charter (the Lithuanian and Italian Courts), and while several of the most recent cases did indeed concern fundamental rights issues (the Spanish *Melloni* case and the French *Jeremy F.* case), others did not (the Lithuanian reference, the Italian first reference, and the Gauweiler reference of the *Bundesverfassungsgericht*). In several cases, the referring courts are "merely" asking questions on the correct interpretation of EU law, in order to be able to answer fairly "run-of-the mill" cases (such as the Lithuanian reference).<sup>33</sup>

In several instances, the reference was used to challenge the validity of EU law, as was the case in *Advocaten voor de Wereld* (on the European Arrest Warrant), *Tests-Achats*, the references on the *Data Retention Directive*, and *Melloni*. In these cases too, Constitutional Courts made "ordinary use" of the preliminary reference procedure, which allows all courts to challenge the validity of EU law. More research is needed into the actual practice of the preliminary reference procedure by Constitutional Courts, but at first sight, it shows a wide range of questions and of reasons for making a reference.

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<sup>32</sup> See the following in this *Special Issue*: Fruzsina Gárdos-Orosz, *Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*; Aleksandra Kustra, *Reading the Tea Leaves. The Polish Constitutional Tribunal and Preliminary Ruling Procedure*; Mihail Vatsov, *European Integration Through Preliminary Rulings? The Case of the Bulgarian Constitutional Court*; Viorica Viță, *The Romanian Constitutional Court and the Principle of Primacy: To Refer or Not To Refer?*.

<sup>33</sup> Case C-239/07, *Sabatauskas et al.*, 2008 E.C.R. I-7523; *Lithuanian Constitutional Court*, decision no. 47/04 of 4 December 2008, available at [www.lrkt.lt](http://www.lrkt.lt).

Looking then at the “tone” of the references, it seems that only the reference of the *Bundesverfassungsgericht* is rather antagonistic and openly challenges or even threatens the CJEU and the EU. The other references are fairly regular references, with some standing out in terms of quality of drafting. The *Melloni* reference of the Spanish *Tribunal constitucional*, for instance, is elaborate and well-drafted, setting out the dilemma facing the *Tribunal* and presenting three possible avenues for the CJEU to address the issue. The reference of the Austrian *Verfassungsgerichtshof* on the Data Retention Directive also illustrates how instructive these references can be and how instrumental they are for the development of European constitutional law.<sup>34</sup> The *Verfassungsgerichtshof* drew the attention of the CJEU to the need for a comparative study of national constitutional systems, and if such a study were to reveal that they provided a more extensive protection than that of the Charter, then the Union courts should be compelled to interpret the Charter as not falling below the common level of protection offered by national constitutions. The Belgian *Cour constitutionnelle* meanwhile often sets out the position under the Belgian Constitution, describing, for instance, how a particular fundamental rights issue is approached under the Constitution, or explaining the constitutional context (e.g. Belgian federalism).<sup>35</sup> These examples show how useful these references can be to bring national and common constitutional traditions, as well as specificities, to the CJEU’s attention, and to demand respect for them. The German *Bundesverfassungsgericht* also made reference to the position of several of its European counterparts in the *OMT referral decision*, but it did so with another objective, as if wanting to present itself to the CJEU as “the leader of the pack”—as representing other constitutional and highest courts that do not accept the absolute primacy of EU law and the final authority of the CJEU. This seems less constructive, to say the least.<sup>36</sup>

So, how has the CJEU reacted to these references? The CJEU has never shown itself to be very impressed with national *constitutional law* in general. From the very beginning, since *Costa v. ENEL*, *Internationale Handelsgesellschaft*, *Simmenthal*, and *Factortame*, it has repeatedly stated that EU law takes precedence over all national law, including constitutional law, and that whatever its nature and rank, conflicting measures have to be set aside. Defenses based on grounds of constitutional infrastructure are not accepted in enforcement actions. Like other international courts, the CJEU simply regards constitutional law as part of the broader category of national law. That a particular issue is deemed to be of constitutional importance in one Member State does not automatically

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<sup>34</sup> *Verfassungsgerichtshof*, decision G 47/12–11 G 59/12–10 G 62,70,71/12–11 of 28 November 2012 (*Data Retention Directive*).

<sup>35</sup> Examples can be found in CLOOTS, *supra* note 21.

<sup>36</sup> For a critical appraisal, see M. Claes and J. H. Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, GERMAN L.J. 917–970 (2015).

imply that the CJEU will treat it with special care, as is clear from a case like *Michaniki*.<sup>37</sup> Nor has the Court ever demonstrated much sympathy for the special status of *Constitutional Courts* in the domestic setting, as is clear from cases like *Simmenthal*, *Križan*, *Winner Wetten*, and *Melki*. This seems to be the natural position of the Court as an international court. Of course, the Court may have good reason to take this position, as it does not have any say over national law and has to treat all Member States in the same manner. But the Court could distinguish “constitutional cases” in a subtler manner, by simply being more responsive to those cases that appear crucial to the countries involved and by truly engaging with the arguments put forward by the referring courts and taking their concerns seriously. Of course, there is a difficulty here: Once the reference has been made, the referring court disappears from the procedure, and the Member State is for the remainder represented by the Government, which may even find itself in a very uncomfortable position, as, for instance, in the *OMT* case. So, the particular set-up of the preliminary reference procedure allows only for a rather rudimentary question-and-answer type dialogue between the national courts and the CJEU, and may not sufficiently facilitate *proper* engagement on constitutional issues.

Has the CJEU been sufficiently responsive to Constitutional Courts making references? In many cases, the CJEU decisions on preliminary references from Constitutional Courts have been criticized precisely for not sufficiently engaging with the national courts, and for not demonstrating full awareness of the importance of the issues involved for the referring courts.<sup>38</sup> Several authors have framed their critique in terms of “pluralism.” But whether one subscribes to the idea of “constitutional pluralism” or approaches constitutional conflict in traditional hierarchical terms, whereby each system leaves openings to the other, deliberation, judicial diplomacy and mutual engagement are essential to both. For the system to function properly, national Constitutional Courts will have to continue on the path that several have taken over the past years. The CJEU will have to demonstrate, more than it has hitherto done, that it understands the position of Constitutional Courts, and it will have to truly engage with their concerns. Only then will Constitutional Courts be prepared to continue to make references.

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<sup>37</sup> Though there are other cases as well, where the CJEU does appear to be sensitive to constitutional concerns of particular Member States and referring courts, even if these concerns may seem of limited interest to others, for instance in Case C-36/02, *Omega*, 2004 E.C.R. I-09609, Case C-391/09, *Runević Vardyn*, 2011 E.C.R. I-03787, or Case C-208/09, *Sayn Wittgenstein*, 2010 E.C.R. I-13693.

<sup>38</sup> On *Melloni*, see, e.g., Leonard F.M. Besselink, *The parameters of constitutional conflict after Melloni*, 4 EUR. L. REV. 531 (2014); Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308 (2014). On *Advocatenoor de Wereld*, the *Money Laundering case* and *Flemish Insurance Case*, see CLOOTS, *supra* note 21.

## The “Polemical” Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law

By Giuseppe Martinico\*

### A. Introduction

Recently, scholars have argued of the necessity of going beyond “judicial dialogues” and “conflict-and-power” approaches to the analysis of the role of national Constitutional Courts in the Union.<sup>1</sup> On the one hand, there are risks connected to a “too welcoming an approach by national constitutional courts to EU law”;<sup>2</sup> on the other hand, it is possible to criticize both the Court of Justice of the EU (CJEU) and some national Constitutional Courts for other, less cooperative, decisions. I share this cautious approach for many reasons, and primarily because the preliminary ruling mechanism does not exhaust all the possible means of communication between constitutional courts and the CJEU.<sup>3</sup> For instance, what Komárek calls “parallel references”<sup>4</sup> can serve, in some circumstances, as a technique of alternative (or hidden) dialogue,<sup>5</sup> that has favored a sort of “remote dialogue”<sup>6</sup> over the years. My sole point of disagreement with this scholarly position is over the role of conflicts in this scenario. Whilst Komárek seems to confine conflicts to phenomena of mere

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<sup>1</sup> Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013).

<sup>2</sup> *Id.* at 449.

<sup>3</sup> See Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring The Techniques Of ‘Hidden Dialogue’*, 21 KING’S L. J. 257 (2010).

<sup>4</sup> Komárek, *supra* note 1, at 436.

<sup>5</sup> Martinico, *supra* note 3; Giuseppe Martinico, *Multiple loyalties and dual preliminary: The pains of being a judge in a multilevel legal order*, 10 INT’L J. CONST. L. 871 (2012).

<sup>6</sup> This is the formula (“dialogo a distanza”) used by Gabriella Angiulli, *Il rinvio pregiudiziale alla Corte di giustizia dell’Unione europea da parte dei Giudici costituzionali degli Stati membri*, [http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA\\_Scuola\\_dottorale\\_in\\_Diritto\\_-ed\\_-economia.pdf](http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA_Scuola_dottorale_in_Diritto_-ed_-economia.pdf) (2011).



resistance or to “‘cold’ strategic considerations,”<sup>7</sup> in this work I am going to adopt a much broader idea of conflict, which goes beyond mere “conflicts and power games.”

My intuition is that the idea of judicial conflicts is, in a way, unavoidable, and always present even in those decisions which appear *prima facie* exquisitely cooperative. A good example of this is the reference raised by the German Constitutional Court to the CJEU and concerning the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (OMT).<sup>8</sup> As Gerstenberg has written, in this case “the deployment of the reference procedure is anything but an act of European-friendliness and judicial comity.”<sup>9</sup>

### **B. The Topicality of Constitutional Conflicts: Why They Are Still There and Why We Need Them**

On 26 February 2013, the CJEU decided *Melloni*,<sup>10</sup> a very important case triggered by a preliminary question raised by the Spanish Constitutional Court.

This preliminary question drew the attention of scholars for at least two reasons. First, the question was raised by the Spanish Constitutional Court, which, for the first time, had decided to use Article 267 TFEU. In this respect, at that time *Melloni* represented the latest

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<sup>7</sup> Komárek, *supra* note 1, at 422. The author was referring to the view expressed by Arthur Dyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?* 9 EURO. CONST. L. REV. 139 (2013).

<sup>8</sup> Orders of 17 December 2013 and of 14 January 2014, 2 Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] 1390/12; 2 BVERFGE 1421/12; 2 BVERFGE 1438/12; 2 BVERFGE 1439/12; 2 BVERFGE 1440/12; 2 BVERFGE 1824/12; 2 BvE 6/12, available at <https://www.bundesverfassungsgericht.de>.

<sup>9</sup> Oliver Gerstenberg, *An End to European Multilateralism: A Comment on the German Bundesverfassungsgericht's OMT decision*, available at <http://eutopialaw.com/2014/02/19/an-end-to-european-multilateralism-a-comment-on-the-german-bundesverfassungsgerichts-omt-decision/> (2014); Giacomo Delledonne, *La 'prima volta' di Karlsruhe: il rinvio pregiudiziale relativo alle outright monetary transactions* (2014), available at <http://www.csfederalismo.it/it/pubblicazioni/commenti/797-la-prima-volta-di-karlsruhe-il-rinvio-pregiudiziale-relativo-alle-outright-monetary-transactions>.

<sup>10</sup> Case C-399/11, Stefano Melloni v. Ministerio Fiscal, available at <http://curia.europa.eu/>. Mr. Melloni, an Italian citizen living in Spain, was convicted in absentia for bankruptcy fraud by a sentence delivered by the Tribunale of Ferrara and arrested by the Spanish police. On the basis of the Council Framework Decision on the European Arrest Warrant (2002/584/JHA as amended by the Framework Decision 2009/299/JHA) the Italian authorities asked for the activation of the mechanism. Mr. Melloni opposed surrender to the Italian authorities, by arguing the violation of the right to defence. The Audiencia Nacional (a special Spanish high court) decided to surrender Mr. Melloni to Italy since it considered the right to defence was respected (Mr. Melloni, in fact, was aware of the trial, opted for the asbentia and appointed two lawyers to defend himself). Against the order of the Audiencia Nacional, Mr. Melloni opposed a recurso de amparo (a direct action for the protection of constitutional rights guaranteed by the Constitution) before the Spanish Constitutional Court.

link in a longer chain of preliminary questions raised by national Constitutional Courts.<sup>11</sup> Second, the CJEU was expected to say something important about Article 53 of the Charter of Fundamental Rights of the EU, concerning the burning issue of the relationship between the standard of protection accorded to the same right at different levels.

In *Melloni*, the CJEU refused a minimalist interpretation of Article 53, saying that such an interpretation “would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution.”<sup>12</sup> It added that:

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.<sup>13</sup>

This was seen as a return to an absolute conception of primacy,<sup>14</sup> and in general it sounded very tough. More recently, on 13 February 2014, the Spanish Constitutional Court, in its follow up to the *Melloni* decision of the Luxembourg Court, reversed its case law and abided by the indications of the CJEU.<sup>15</sup> The Spanish follow up to the *Melloni* case was a bit ambiguous because: “[W]hile the outcome does fulfil the mandates of EU law, the reasoning proves quite unsettling.”<sup>16</sup>

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<sup>11</sup> After the delivery of this Article, two other Constitutional Courts raised preliminary questions ex Art. 267 TFEU to the CJEU: the Ustavno sodišče (Slovenian Constitutional Court), Order U-I-295/13) available at <http://www.us-rs.si/aktualno/novice/sklep-ustavnega-sodisca-st-u-i-29513-z-dne-6-11-2014/> and the Trybunał Konstytucyjny (Polish Constitutional Court) decision K 61/13, available at [http://otk.trybunal.gov.pl/OTK/otk\\_odp.asp?droga=%28otk\\_odp%29&sygnatura=K%2061/13](http://otk.trybunal.gov.pl/OTK/otk_odp.asp?droga=%28otk_odp%29&sygnatura=K%2061/13).

<sup>12</sup> *Melloni*, Case C-399/11 at para.58.

<sup>13</sup> *Id.* at para.60.

<sup>14</sup> To quote the formula used, also recently, by some scholars: Armin von Bogdandy & Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

<sup>15</sup> Tribunal Constitucional (Spanish Constitutional Court), sentencia No. 26/2014 of 13 February 2014, available at <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCCICC262014en.aspx>.

<sup>16</sup> Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308 (2014).

More generally, this case gives an idea of the very difficult role played by national Constitutional Courts and of the part relativization, for certain aspects, of their mandate. This decision is in line with other recent rulings of the CJEU in which the Luxembourg Court has not shown great deference towards national Constitutional Courts; I am referring to the *Filipiak*<sup>17</sup> and the *Winner Wetten*<sup>18</sup> cases, for instance, which will be considered later in this article. This tendency does not seem to cohere with another recent trend which sees Constitutional Courts as being increasingly open to Article 267 TFEU, nor with another series of decisions which has been traced back to a sort of margin of appreciation doctrine of the CJEU.<sup>19</sup>

However, despite this new trend, conflicts are still at the heart of EU law. This Article is about these conflicts, and the role that they play as potential engines for the transformation of EU constitutional law.<sup>20</sup> This work aims to stress the origin, structure, and necessity of these conflicts in the current phase of EU constitutional law.

I am not going to deal with all the possible conflicts present in EU law. Rather, I shall focus on those conflicts that I call “conflicts by convergence”: conflicts due to the (partial) convergence among levels. Then I shall turn to consider “constitutional conflicts”: conflicts between the primacy of EU law and the supremacy of national constitutions.<sup>21</sup>

The Article is divided into three parts. In the first part, I shall briefly present my view on Article 4(2) TEU. This provision has been described as the codification of a new concept of primacy<sup>22</sup> and as a basis for a more cooperative phase among courts. I think this clause represents the apex of a broader process, but at the same time I do not perceive this process (of partial convergence) as one of a progressive route towards pacification in the

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<sup>17</sup> Case C-314/08, *Filipiak*, 2009 E.C.R. I-11049.

<sup>18</sup> Case C-409/06, *Winner Wetten*, 2010 E.C.R. I-08015.

<sup>19</sup> “The ECtHR’s margin of appreciation doctrine plays a role similar to that of the reverse *Solange* jurisprudence of Schmidberger and *Omega*—allowing the court to acknowledge and defer to national specificities in the understanding of common principles—while the BVG’s *Görgülü* doctrine corresponds to *Solange*—allowing the national court to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights.” Charles F. Sabel & Oliver Gerstenberg *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L. J. 511 (2010).

<sup>20</sup> On the importance of constitutional transformation in European constitutional law, see JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, *THE CONSTITUTION’S GIFT. A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION* 28 (2010). See also Joseph H. H. Weiler, *The transformation of Europe*, in *THE CONSTITUTION OF EUROPE* 10 (Joseph H. H. Weiler ed., 1999).

<sup>21</sup> Using the distinction employed by the Spanish Constitutional Court: Tribunal Constitucional, *declaración* 1/2004 of 13 December 2004, available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es).

<sup>22</sup> von Bogdandy & Stephan Schill, *supra* note 14.

relationship between constitutional poles<sup>23</sup> (or levels, to employ another terminology).<sup>24</sup> On the contrary, in my view constitutional conflicts are and will remain central in the evolution of EU law. Starting from this premise, in the second part of this article I shall offer a classification of constitutional conflicts.

In the final part of the Article, I will present some concluding thoughts on the destiny of these conflicts.

### C. Constitutional Conflicts and the Treaty of Lisbon

In 2011, von Bogdandy and Schill<sup>25</sup> described Article 4(2) TEU<sup>26</sup> as being one of the most important novelties of the Lisbon Treaty, reading this provision as being an exception to primacy provided for under EU law itself.<sup>27</sup> They suggested that this Article could “guide the way to a more nuanced understanding beyond the categorical positions of the CJEU on

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<sup>23</sup> On constitutional pluralism, see Neil MacCormick, *Beyond the sovereign state*, 56 MOD. L. REV. 1 (1993); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); and Miguel P. Maduro, *Contrapuntal law: Europe’s constitutional pluralism in action*, in SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

<sup>24</sup> Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?*, 36 COMMON MKT. L. REV. 703 (1999); Franz Mayer & Ingolf Pernice, *La costituzione integrata dell’Europa*, in DIRITTI E COSTITUZIONE NELL’UNIONE EUROPEA 49, 43 (Gustavo Zagrebelsky ed., 2005); Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511 (2002). On multilevel constitutionalism, see also LEONARD BESSELINK, *A COMPOSITE EUROPEAN CONSTITUTION/EEN SAMENGESTELDE EUROPESE CONSTITUTIE* (2007).

<sup>25</sup> von Bogdandy & Schill, *supra* note 14.

<sup>26</sup> Article 4 TEU states,

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

<sup>27</sup> von Bogdandy & Schill, *supra* note 14, at 1,418.

the one side ... and that of most domestic constitutional courts.”<sup>28</sup> Their argument is based on the pluralistic spirit of Article 4 TEU and on the importance of judicial cooperation and loyalty (principles recalled in Article 4).

Article 4(2) TEU represents the apex of a “crescendo” and is in natural continuity with the progressive “constitutionalization” of the EU that has occurred over the years. This constitutionalizing process is one in which the EU has gradually come to partly overcome its purely economic nature, becoming something more: a union based on fundamental rights as acknowledged in the national constitutions.<sup>29</sup> This provision should be read, therefore, as the confirmation of a long process which commenced after *Solange I*;<sup>30</sup> it should be read as a direct product of the dialectic which exists between the national Constitutional Courts and the CJEU. The rapprochement<sup>31</sup> between the national and the supranational legal orders which exists in this context has been extensively studied and I am not going to recall such a well-known story.

The important point for the purposes of this article is that this process of rapprochement has created a shared zone of principles between the national and supranational legal orders, and is also confirmed by the reference made in Article 6 TEU to the “constitutional traditions common to the Member States.”<sup>32</sup> Further evidence of this is to be found in the clauses of the Charter of Fundamental Rights of the EU which refer to the “national laws and practices” that have been introduced in order to avoid a breach of the national constitutions.<sup>33</sup> However, on closer analysis one could argue that neither Article 4 TEU nor

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<sup>28</sup> *Id.*

<sup>29</sup> I developed this thesis in Giuseppe Martinico, *What lies behind Article 4.2 TEU?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 93 (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013).

<sup>30</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case 2 BvG 52/71 Bundesverfassungsgericht: Federal Constitutional Court [1974] 2 CMLR 540.

<sup>31</sup> On this process, see LUIS I. GORDILLO, INTERLOCKING CONSTITUTIONS TOWARDS AN INTERORDINAL THEORY OF NATIONAL, EUROPEAN AND UN LAW 66 (2012). The Author describes a process, consisting of two stages—“the establishment of the red lines” and “the rapprochement of positions.”

<sup>32</sup> Alessandro Pizzorusso, *Common constitutional traditions as Constitutional Law of Europe?* SANT’ANNA LEGAL STUDIES (STALS) RESEARCH PAPER, 1/2008, [http://stals.sssup.it/files/stals\\_Pizzorusso.pdf](http://stals.sssup.it/files/stals_Pizzorusso.pdf) (2008).

<sup>33</sup> See, for instance, Articles 9 (“right to marry and right to found a family”), 10(2) (“freedom of thought, conscience and religion”), 14(3) (“right to education”), 27 (“workers’ right to information and consultation within the undertaking”), 28 (“right of collective bargaining and action”), 30 (“protection in the event of unjustified dismissal”), and 34–36 (“social security and social assistance”, “health care” and “access to services of general economic interest”). A possible effect of such provisions might be to increase the reference to the national traditions of Member States, a sort of margin of appreciation doctrine spread at EU level—especially when the reference to national legislations and practices is not accompanied by that to EU law—but of course this also implies the risk of an erroneous reference to national legislations. Title IV, devoted to “Solidarity,” is particularly rich in such references and perhaps it is not a coincidence, since in this field the EUCFR is more innovative than in

its predecessors or successors will (automatically, at least) lead to greater cooperation. Indeed, these open provisions could *increase* rather than *decrease* the risk of conflicts in the multilevel system.

My argument to this effect is that the progressive attention paid by the EU to fundamental rights<sup>34</sup> has created new causes of conflicts rather than extinguishing such conflicts entirely. In fact, the product of this convergence gave birth to new kinds of conflicts among interpreters—conflicts due to the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the CJEU and national Constitutional Courts. Such a scenario has produced dynamics of interpretive competition. It is sufficient to look at Article 4(2) TEU for confirmation of this. Who, for example, is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States? National Constitutional Courts or the CJEU?<sup>35</sup> Similar considerations apply to other open provisions (i.e., provisions referring to national law in the interpretation of EU law)<sup>36</sup> present in recent EU constitutional politics. Here it suffices to recall the *Lissabon Urteil*,<sup>37</sup> where the German Constitutional Court specified the sensitive sectors that embody national constitutional identity. In so doing, the German

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other cases (with the exceptions of the title devoted to “Citizens’ rights”, for obvious reasons) compared with the ECHR.

<sup>34</sup> After the delivery of this article, this attention paid to fundamental rights has been somehow questioned by Opinion 2/13 delivered by the CJEU and concerning the accession of the EU to the ECHR. CJEU, Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), <http://curia.europa.eu/>. However, despite this Opinion, I still think that the EU has not abandoned its project to transform itself into a Europe of Rights.

<sup>35</sup> See Antonio Ruggeri, *Trattato costituzionale, europeizzazione dei ‘controlimiti’ e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, available at [www.forumcostituzionale.it](http://www.forumcostituzionale.it) (2005). See also, Mattias Kumm, *The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L. J. 262 (2005).

<sup>36</sup> For instance, the many provisions of the Charter of Fundamental Rights of the EU. I reflected on these clauses in another piece: Giuseppe Martinico, *Chasing the European Court of Justice: On Some (Political) Attempts to Hijack the European Integration Process*, 14 INT’L COMMUNITY L. REV. 243 (2012).

<sup>37</sup> “European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.” Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], cases 2 BvE 2/08 at para. 249.

Constitutional Court made an important contribution to the definition of Article 4 TEU, in its problematic concept of “national identity.” However, one can see the risk of proceeding in this way. The risk is of interpretive anarchy—of a context in which each Constitutional Court can express its own view on the notion of constitutional identity while pretending to participate in a “pluralist” interpretation. This episode confirms the risks present in a clause like Article 4(2) TEU<sup>38</sup> and confirms also the impossibility of neutralizing conflicts in general by means of such clauses.

To summarize, norms like these are the outcome of a process of partial convergence which began in the aftermath of the early conflicts between national and supranational interpreters. These were conflicts which arose due to the absence, at supranational level, of provisions comparable to those aimed at protecting “fundamental rights” at national level. In other words, they were *conflicts by divergence* or *conflicts by absence* of a comparable discipline in EU law. The *new* conflicts—the conflicts characterizing the current phase—seem to be, on the contrary, conflicts due to the existence of an area of overlap between the national and supranational level. In other words, they are *conflicts by convergence* or *conflicts by presence* of an EU law discipline. I have elsewhere<sup>39</sup> described this overlap zone between legal orders as the core of the complex (*complexus* in Latin means “interlaced”) structure of European law.<sup>40</sup> This structure favors the emergence of particular antinomies (conflicts), due to the consequent and inherent difficulty in distinguishing among the different legal levels.

In this sense, one could say that an antinomy is complex if it cannot be resolved by looking at the relations between legal orders: in other words, starting from the assumption of the

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<sup>38</sup> More recently see a decision of the Czech Constitutional Court which did not have to do with constitutional identity but which demonstrates the permanent risks of conflicts even after the entry into force of Article 4(2) TEU. Ústavní soud (Czech Constitutional Court, judgment of 31 January, Pl. ÚS 5/12, Slovak Pensions XVII. The English translation is available at <http://www.usoud.cz/>.

<sup>39</sup> GIUSEPPE MARTINICO, *THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS: THE FRUSTRATING KNOT OF EUROPE* (2012).

<sup>40</sup> The *mot-problème* (EDGAR MORIN, *INTRODUZIONE AL PENSIERO COMPLESSO*, 1993, and EDGAR MORIN, *CONOSCENZA DELLA CONOSCENZA*, 1989) complexity is polysemous. Millard, for instance, recalls at least four different meanings of the word ‘complex’ (Eric Millard, *Éléments pour une approche analytique de la complexité*, in *DROIT ET COMPLEXITE POUR UNE NOUVELLE INTELLIGENCE DU DROIT VIVANT* 141 (Mathieu Doat, Jacques Le Goff, & Philippe Pédrot eds., 2007)). Complex, in fact, is often used as a synonym of “complicated” and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal abundance caused by the coexistence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer “à la situation d’un objet fragmentée, découpée. L’ensemble social n’est pas simple, au sens d’une théorie des ensembles: il résulte de l’addition ou de l’interaction entre une pluralité d’ensembles partiels, eux-mêmes sans doute s’entremêlés (Id. 143).” Thirdly, complex is understood as non-aprioristic/pragmatic; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. On Europe as a complex system, see EDGAR MORIN, *PENSARE L’EUROPA* (1988).

prevalence of order A over order B, we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B. This occurs because in an integrated and interlaced system x and y could belong to both legal orders, A and B.

This situation is also characterized by the absence of a clear and univocal supremacy clause. The absence of univocal norms of collision influences the “reducibility” and the “resolvability” of the constitutional conflict in a multi-layered system. Looking at this scenario, multilevel constitutionalism in fact suffers from the absence of an unambiguous *primacy* clause.<sup>41</sup> The antinomies can only be resolved on a case-by-case basis, and not by an unequivocal solution offered by a precise rule for collision norms (such as a clear and undisputed supremacy clause), because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level.

With these preliminary considerations in mind, I shall sketch a classification of different types of constitutional conflicts present in the European complex order. A *caveat* should, however, be introduced at this point. I am fully aware that the typology presented is not exhaustive of all the conflicts existing in the European legal arena. At the same time, I am also conscious of the fact that some *conflicts by divergence* are still present in EU law.<sup>42</sup> This is due to the fact that in spite of the aforementioned rapprochement, there is still a relevant “distance” (as so-called by Gabriella Angiulli<sup>43</sup>) between the positions of the different levels. However, in this piece I shall not be taking these kinds of conflicts into account.

#### D. The Idea of Agonistic Pluralism

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<sup>41</sup> Scholars have identified at least four different meanings of primacy/supremacy in CJEU case law. Moreover, the notion of primacy enshrined in Art I-6 of the Constitutional Treaty seems to be different from that used by the CJEU. See, e.g., MONICA CLAES, *THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION* 100 (2006). In order to find a solution to this ambiguity, some scholars have devised a ‘law of laws’; see Willem Tom Eijsbouts & Leonard Besselink, *Editorial: The Law of Laws—Overcoming Pluralism*, 4 EUR. CONST. L. REV. 395 (2008).

<sup>42</sup> See, for instance, the piece by Marco Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe*, LSE ‘EUROPE IN QUESTION’ DISCUSSION PAPER SERIES, 13/2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518629](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518629) (2009). See also the special issue of the *European Law Journal* (Volume 18, Issue 5) devoted to this subject and edited by Damian Chalmers and Marco Dani with contributions by Michelle Everson, Christian Joerges, Alexander Somek, and Floris de Witte. See also MARCO DANI, *IL DIRITTO PUBBLICO EUROPEO NELLA PROSPETTIVA DEI CONFLITTI* (2013).

<sup>43</sup> Angiulli, *supra* note 6.



Traditionally, Constitutional Courts have been deemed “enemies”<sup>44</sup> of the CJEU. More recently, however, a growing number of Constitutional Courts have been progressively accepting the cooperative mechanism established by Article 267 TFEU.

The Constitutional Courts of Germany,<sup>45</sup> Belgium,<sup>46</sup> Austria,<sup>47</sup> Lithuania,<sup>48</sup> Italy,<sup>49</sup> Spain,<sup>50</sup> France,<sup>51</sup> Slovenia,<sup>52</sup> and Poland,<sup>53</sup> have made preliminary references to the CJEU. I shall try to capture the essence of the relationship between these Constitutional Courts and the CJEU by using Mouffe’s idea of “agonistic pluralism.”<sup>54</sup>

<sup>44</sup> This was, for instance, the word used by Christian Tomuschat, *La Unión Europea en el marco constitucional de los Estados Miembros. El caso de Alemania*, at a conference given at the Complutense University on 17 April 2013. See also Sabrina Ragone, *Las relaciones de los Tribunales Constitucionales de los Estados miembros con el Tribunal de Justicia y con el Tribunal Europeo de Derechos Humanos: una propuesta de clasificación*, REVISTA DE DERECHO CONSTITUCIONAL EUROPEO, available at <http://www.ugr.es/~redce/REDCE16/articulos/02SRagone.htm> (2011).

<sup>45</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], orders of 17 Dec. 2013 and of 14 Jan. 2014, 2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12; 2 BvE 6/12, available at <https://www.bundesverfassungsgericht.de>.

<sup>46</sup> Among others, see Cour d’Arbitrage [Belgian Court of Arbitration], 19 February 1997, no. 6/97, available at [www.arbitrage.be/fr/common/home.html](http://www.arbitrage.be/fr/common/home.html)

<sup>47</sup> Among others, see Verfassungsgerichtshof VfGH [Austrian Constitutional Court], 10 March 1999, B 2251/97, B 2594/97, available at [www.vfgh.gv.at/cms/vfgh-site](http://www.vfgh.gv.at/cms/vfgh-site)

<sup>48</sup> Lietuvos Respublikos Konstitucinis Teismas [The Constitutional Court of the Republic of Lithuania], decision of 8 May 2007, available at [www.lrkt.lt](http://www.lrkt.lt)

<sup>49</sup> Corte Costituzionale [Italian Constitutional Court], sentenza no. 102/2008 and ordinanza no. 103/2008, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it). The preliminary reference was raised during *principaliter* proceedings. More recently the Italian Constitutional Court extended its *revirement* to *incidenter* proceedings, see: ordinanza 207/2013, [http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza\\_207\\_2013\\_completa.pdf](http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza_207_2013_completa.pdf)

<sup>50</sup> Tribunal Constitucional [Spanish Constitutional Court] Auto 86/2011, available at <http://www.tribunalconstitucional.es/>.

<sup>51</sup> Conseil Constitutionnel [French Constitutional Council], Décision n° 2013-314P QPC 4 April 2013, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314p-qpc/decision-n-2013-314p-qpc-du-04-avril-2013.136588.html>.

<sup>52</sup> Ustavno sodišče [Slovenian Constitutional Court], Order U–I–295/13) available at <http://www.us-rs.si/aktualno/novice/sklep-ustavnega-sodisca-st-u-i-29513-z-dne-6-11-2014/>.

<sup>53</sup> Trybunał Konstytucyjny [Polish Constitutional Court] decision K 61/13, available at [http://otk.trybunal.gov.pl/OTK/otk\\_odp.asp?droga=%28otk\\_odp%29&sygnatura=K%2061/13](http://otk.trybunal.gov.pl/OTK/otk_odp.asp?droga=%28otk_odp%29&sygnatura=K%2061/13).

<sup>54</sup> Among her works, see CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1993); CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000); CHANTAL MOUFFE, *ON THE POLITICAL* (2005) (“I use the concept of agonistic pluralism to present a new way to think about democracy which is different from the traditional liberal conception of democracy as a negotiation among interests and is also different from the model which is currently being developed by people like Jürgen Habermas and John Rawls. While they have many differences, Rawls and Habermas have in common the idea that the aim of the democratic society is the creation of a consensus, and that consensus is possible if

Before doing that, it is necessary to recall the main features of Mouffe's thought. Her considerations start from the nexus existing between democracy and conflicts in the attempt to describe an "agonistic" public sphere conceived as the "sine qua non for an effective exercise of democracy."<sup>55</sup>

Another feature of her thought is the skepticism towards those reconstructions based on ideas of universal consensus that claim to "establish the privileged rational nature of liberal democracy and consequently its universal validity"<sup>56</sup> and which perceive conflicts as mere irrationalities.<sup>57</sup>

Conflict is crucial in democratic life and denying it, as Mouffe says, has dangerous consequences. Such denial can lead to authoritarian results, since it may be inspired by the belief in a universal and right order. Mouffe's criticism of what she defines as the "optimistic anthropology" is strong and leads her into a confrontation with the principal contemporary thinkers Habermas, Rawls, Giddens, Held, and Beck.

Fundamental in this respect is the legacy of Carl Schmitt, whose thought has been "domesticated" by Mouffe, who tries to extract from his conception of the political (his contraposition friend/enemy) a version of this thought which might be compatible with democratic premises.<sup>58</sup> Mouffe is clear in shutting the door of her pluralism to all those positions that deny democratic premises: "A democratic society cannot treat those who put basic institutions into question as legitimate adversaries."<sup>59</sup>

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people are only able to leave aside their particular interests and think as rational beings. However, while we desire an end to conflict, if we want people to be free we must always allow for the possibility that conflict may appear and to provide an arena where differences can be confronted. The democratic process should supply that arena."); CHANTAL MOUFFE, *HEARTS, MINDS AND RADICAL DEMOCRACY*, available at <http://www.redpepper.org.uk/hearts-minds-and-radical-democracy/> (1998).

<sup>55</sup> CHANTAL MOUFFE, *ON THE POLITICAL* 3 (2005).

<sup>56</sup> CHANTAL MOUFFE, *ON THE POLITICAL* 84 (2005).

<sup>57</sup> "Because for me that is what politics is about. If there is politics in society it is because there is conflict [...] I started to look at Freud. He does not really develop this idea from the perspective of the collective subject; he develops it more in terms of the individual. I consider the idea of the division of the subject—Eros and Thanatos—and the way the concept of the drive is linked to conflict, very important for politics. I have also been interested in the work of Elias Canetti, in 'Masse und Macht', when he insists that there is a tension between the individuality and the drive to be part of the mass. Again, the idea that we are divided is predominant." Chantal Mouffe, *Hegemony, Democracy, Agonism and Journalism: An Interview with Chantal Mouffe*, 7 *JOURNALISM STUD.* 964 (2006), [http://eprints.lse.ac.uk/3020/1/Hegemony,\\_democracy,\\_agonism\\_and\\_journalism\\_%28LSERO%29.pdf](http://eprints.lse.ac.uk/3020/1/Hegemony,_democracy,_agonism_and_journalism_%28LSERO%29.pdf).

<sup>58</sup> JEFF NOONAN, *DEMOCRATIC SOCIETY AND HUMAN NEEDS* 193 (2006).

<sup>59</sup> CHANTAL MOUFFE, *ON THE POLITICAL* 120 (2005).

Although the concept of agonistic pluralism was conceived of for social conflicts in general, and not specifically for constitutional conflicts, the concept may explain cases in which the CJEU has reached conclusions that one could define as “aggressive” (perhaps especially if compared to the solution reached in *Omega*<sup>60</sup>). I am referring here to such cases as *Michaniki*,<sup>61</sup> *Zambrano*,<sup>62</sup> and *Elchinov*.<sup>63</sup>

Mouffe’s theory, and her notion of “conflictual consensus,” can explain the CJEU’s judicial schizophrenia here.<sup>64</sup> In other words, the partial convergence in the field of fundamental rights has favored the emergence of a context characterized by the sharing of some fundamental rules between supranational and national actors. Such fundamental rules work as the natural premise of every form of interaction between the actors of the multilevel legal order, but their existence does not preclude the presence of different interpretations or other forms of disagreement. Thus there may be consensus on some basic premises but disagreement on interpretations.

To explain this situation, Mouffe uses the notion of “agonism.” This is to be distinguished from “antagonism”; the difference is based on the transformation of the Schmittian figure of the “enemy” into that of “adversary”, who is to be conceived as “somebody whose ideas we combat but whose right to defend those ideas we do not put into question.”<sup>65</sup>

According to this construction, many of the clashes occurring between Constitutional Courts and the CJEU should be understood as an example of conflict in these terms, produced by one of these interpretative disagreements described by Mouffe.

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<sup>60</sup> Case C–36/02, *Omega*, 2004 E.C.R. I–9609.

<sup>61</sup> Case C–213/07, *Michaniki*, 2008 E.C.R. I–9999.

<sup>62</sup> Case C–34/09, *Gerardo Ruiz Zambrano v. Office National de l’emploi*, 2011 E.C.R. I–01177.

<sup>63</sup> Case C–173/09, *Elchinov*, 2010 E.C.R. I–08889.

<sup>64</sup> “It needs what I call a ‘conflictual consensus.’ We need to accept a common symbolic framework, but within this symbolic framework, of course, there is room for disagreement. Let me give you an example of what I mean by that. The common symbolic framework of modern pluralist democracy is the expression of ‘liberty and equality for all’. Those are its ‘ethico-political principles’. Citizens in a pluralist democracy need to agree that those are the principles that are going to inform their coexistence. But, of course, those shared principles can be interpreted in many different ways. After all, what is liberty? What is equality? And who belongs to this ‘all’? There are many different interpretations of this last term alone, and we should accept the legitimacy of those different interpretations.” Chantal Mouffe, *Which Public Space for Critical Artistic Practices?*, [http://readingpublicimage.files.wordpress.com/2012/04/chantal\\_mouffe\\_cork\\_caucus.pdf](http://readingpublicimage.files.wordpress.com/2012/04/chantal_mouffe_cork_caucus.pdf) (2005).

<sup>65</sup> CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 102 (2000). On the Schmittian influence, see Onur Ulas Ince, *The Return Of The Schmittian: Radical Democratic Theory At Its Limits*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1675583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675583) (2009).

In fact, following initial collisions with national Constitutional Courts, the CJEU seemed to gradually get the point, by incorporating the concept of fundamental rights as a premise of the primacy of EU law. New and important provisions were, in addition, introduced into the Treaties, namely former Articles 6 and 7 of the TEU. Despite this convergence, the progressive expansion of CJEU activity into national fields has meant that tension between the CJEU and the Constitutional Courts has not been lacking. Moreover, convergence has given birth to new kinds of conflicts among interpreters—conflicts due to the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the CJEU and the national constitutional Courts. This has produced dynamics of interpretive competition.

All this is consistent with Mouffe’s theory. Although the actors of this complex legal system now share the need to respect those constitutional goods conceived as fundamental rights according to the multilevel case law, the possibility of interpretative disagreements remains. This description arguably best explains the current state of the relationship between Constitutional Courts and the CJEU. They are competitors and antagonists, but this is not pathological, as it also occurs in other contexts.<sup>66</sup>

The clearest confirmation of this is the *Solange* saga.<sup>67</sup> With this saga, what was potentially a crisis of the European process came to serve as a turning point, marking the beginning of a new period in the case law of the CJEU and the Constitutional Courts.

The *Solange* decision paved the way for a long-lasting confrontation between the CJEU and national Constitutional Courts. Over the years, the CJEU seemed to take the point by incorporating the concept of fundamental rights as a premise of the primacy of EU law. It is too early to foresee what will happen next and nobody has a crystal ball; but in this respect it is worth mentioning how the *Melki* case,<sup>68</sup> which could, on first glance, be described as having been inspired by a generosity of spirit on the part of the CJEU towards the national courts, actually represents a reaffirmation (although in a “milder” version) of the

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<sup>66</sup> Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in IN RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (“In one important sense, however, the relationship between the European Union and its Member States is, of course, different from that between the United States and the several states. In the United States, the relationship between federal and state law, and, in particular, between the federal Supreme Court and the state judiciary, are fully ordered...In the European Union, by contrast, the relationship between the central and component state legal orders is fundamentally unsettled.”)

<sup>67</sup> Started with the famous *Solange I*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvG 52/71 Bundesverfassungsgericht: Federal Constitutional Court [1974] 2 CMLR 540.

<sup>68</sup> Joined Cases C–188/10 and C–189/10, *Melki and Abdeli*, 2010 E.C.R. I–05667.

*Simmenthal* doctrine,<sup>69</sup> and how the CJEU probably declined to go a step further since the corresponding constitutional interlocutors had already solved the issue. At the same time, as Millet pointed out, the CJEU took the chance to point out and strengthen the *Foto Frost* doctrine.<sup>70</sup>

On the other side, Constitutional Courts have not entirely given up their original position, as is demonstrated by ambivalent decisions like *Honeywell*<sup>71</sup> and the OMT reference. For instance, although in *Honeywell*, the German Court acknowledged the possibility of margin of error to the CJEU, at the same time, it has not renounced its role of counter-power to the Luxembourg Court in the process of European integration, even in extraordinary circumstances, and perhaps only after having "consulted" with the CJEU.<sup>72</sup> This indeed occurred in the OMT decision case, where, as we saw earlier on in this article, the German Constitutional Court referred a preliminary question to the CJEU for the first time in its history.

Even, then, in national decisions that seem "friendly" at first glance, one can find the "germ" of new constitutional conflicts. This will not, however, necessarily lead to the disintegration of the Union. On the contrary, my idea is that constitutional conflicts (or, rather, *some* constitutional conflicts) may sometimes play a systemic role in the changing nature of the EU legal order.

In other words, constitutional conflicts are functional to the transformation of EU law. This is consistent with the idea of "disorder" present in complexity studies,<sup>73</sup> where disorder and conflict are not seen as a disturbing element but rather as an element of dynamism,

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<sup>69</sup> François-Xavier Millet, *La 'question prioritaire de constitutionnalité' e il dialogo a singhiozzo tra giudici in Europa (Unione europea, Corte di giustizia dell'Unione europea, grande sezione, sentenza 22 giugno 2010, cause C-188/10 e C-189/10)*, 17 *GIORNALE DI DIRITTO AMMINISTRATIVO* 139 (2011).

<sup>70</sup> Case C-314/85, *Foto-Frost*, 1987 E.C.R. 4199.

<sup>71</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 26 Aug. 2010, Case No. 2 BvR 2261/06.

<sup>72</sup> As Mayer pointed out: "[A]n ultra vires-control of European acts by the German Constitutional Court would only occur in extraordinary circumstances and obvious cases, and apparently a preliminary reference to the ECJ would have to take place first." Franz Mayer, *Rashomon in Karlsruhe—A Reflection on Democracy and Identity in the European Union*, JEAN MONNET WORKING PAPER, 5/10, available at <http://jeanmonnetprogram.org/paper/rashomon-in-karlsruhe-a-reflection-on-democracy-and-identity-in-the-european-union/> (2010).

<sup>73</sup> As Le Goff put it when writing about the relation between complexity and labour law: "Comme si s'on optait pour la technique homéopathique de lutte contre le mal par le mal lui-même, le désordre devenant paradoxalement vecteur d'ordre", Jacques Le Goff, *Le droit du travail, terre d'élection de la complexité*, in *DROIT ET COMPLEXITE POUR UNE NOUVELLE INTELLIGENCE DU DROIT VIVANT* 106 (Mathieu Doat, Jacques Le Goff & Philippe Pédrot eds., 2007).

which allows the system to transform its main features.<sup>74</sup> Order and disorder thus interact, favoring the emergence of social changes and the renewal of the organization.

In this sense “order” should be understood as the whole of the interactions and intersections among “ensembles juridiques.”<sup>75</sup> Order is, above, all the process triggered by these interactions (that may be competitive, cooperative, or conflictual) between interdependent legal systems.<sup>76</sup>

It is important to clarify that for the purposes of this article conflicts are understood as disorder, but that not all the differences among levels (or constitutional poles) lead to conflictual relations. This is because there are times when EU law may tolerate different standards of protection (in cases different from *Melloni*, for instance). In these cases, variety in standards does not undermine the primacy of EU law, and an example of such a case would be *Omega*.<sup>77</sup>

### E. Back to the Case Law: A Possible Typology of Constitutional Conflicts

In the light of this theoretical framework, I shall move back to the cases.

As was earlier stated, the kinds of conflicts in question can be traced back to the structure of the European legal order. They are due to the constitutionalization of the EU understood as a complex order—that is, as an order characterized by a sort of constitutive interlacement of norms.

Applying the scheme laid out by Chantal Mouffe, one can identify some examples of “disagreement over interpretations”:

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<sup>74</sup> This is also consistent with a certain branch of political science scholars: JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992). See also the importance of the relationship between conflicts and order in MACHIAVELLI, especially in the DISCOURSES ON THE TEN BOOKS OF TITUS LIVY. On this see: ALBERTO GIACOMIN, *La ‘roba’ e gli ‘onori’: conflitto distributivo e ordine politico nel pensiero di Machiavelli*, NOTE DI LAVORO, [http://www.unive.it/media/allegato/DIP/Economia/Note\\_di\\_lavoro\\_sc\\_economiche/NL2007/NL\\_DSE\\_Giacomin\\_11\\_07.pdf](http://www.unive.it/media/allegato/DIP/Economia/Note_di_lavoro_sc_economiche/NL2007/NL_DSE_Giacomin_11_07.pdf) (2007).

<sup>75</sup> MIREILLE DELMAS MARTY, *LE PLURALISME ORDONNE ET LES INTERACTIONS ENTRE ENSEMBLES JURIDIQUES*, RECUEIL DALLOZ 951 (2006).

<sup>76</sup> For a different but very convincing idea of order, see Giulio Itzcovich, *Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts*, 18 EUR. L. J. 358 (2012). For a stimulating reading on the relation between order and disorder see: Neil Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 INT’L J. CONST. L., 373 (2008).

<sup>77</sup> *Omega*, Case C–36/02.

(1) Conflicts over the interpretation *stricto sensu* understood and concerning the interpretation of the same and shared principle (*Rodriguez Caballero, Cordero Alonso*).

(2) Conflicts due to the dual role played by national common judges (*Winner Wetten, Filipiak, Križan*).

(3) Conflicts over the interpretative monopoly caused by an ‘octroyée’ interpretation of the national constitutional materials (*Mangold, Küçükdeveci*).

(4) Constitutional conflicts concerning the contrast between EU law as interpreted by the CJEU and provisions in national constitutions (*Kreil, Michanicki*).

Whilst this classification is not exhaustive, and some of these cases could be placed in more than one category, the classification itself is useful in analyzing what is going on after the partial convergence described above.

*1. Conflicts over the Interpretation Stricto Sensu Understood and Concerning the Interpretation of the Same and Shared Principle* (Rodriguez Caballero, Cordero Alonso)

The *Cordero Alonso* case is emblematic of the disagreement caused by the different interpretations given to a shared principle by two different interpreters. It confirms that the mere sharing of principles that are, from a literal point of view, common, does not mean that the interpreters will agree on the interpretation to accord it.

In *Cordero Alonso*,<sup>78</sup> the Spanish judge referring the question to the CJEU asked about the necessity of disapplying a national provision (Article 33 of the Workers’ Statute). This provision had already been acknowledged as inconsistent with the EU principle of non-discrimination by the CJEU in a previous judgment,<sup>79</sup> but it had also (and following the first CJEU judgment on this matter) been interpreted in a way consistent with the constitutional principle of non-discrimination by the Spanish Constitutional Court.<sup>80</sup>

Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court’s interpretation of that principle. This “applies

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<sup>78</sup> Case C-81/05, *Cordero Alonso*, 2006 E.C.R. I-7569.

<sup>79</sup> Case C-442/00, *Rodríguez Caballero*, 2002 E.C.R. I-11915.

<sup>80</sup> Tribunal Constitucional [Spanish Constitutional Court], decision No. 306/1993 of 25 October 1993, *available at* [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)

even when the national rules at issue are, according to the constitutional case law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system.”<sup>81</sup>

In this case, the national judge was unable to decide which court to follow and, in order to avoid a decision which would have been seen as challenging the case law of the Spanish Constitutional Court, decided to refer an interpretive question to the CJEU about the meaning and scope of the principle of non-discrimination in EU law. The CJEU confirmed its previous interpretation, recalling how the *Simmenthal* doctrine and the principle of the autonomy of EU law required the disapplication of national law conflicting with European legislation. In this manner, the CJEU offered an interpretation of the principle which was very different to that provided by the Spanish Constitutional Court: although a provision is consistent with the national Constitution it has to be disapplied if it contrasts with the EU law as interpreted by the CJEU.

Such kinds of conflicts, exemplified in *Cordero Alonso* and caused by the dual loyalty of national judges to the CJEU and to their own Constitutional Courts, have been nourished over the years by the progressive constitutionalization of the EU. In this sense, the referring judge in the *Cordero Alonso* case was merely a collateral victim of the interpretive competition between Constitutional Courts and the CJEU—an interpretive competition that paradoxically increased with the progressive constitutionalization of the EU. The CJEU began to increasingly grant an important role to national constitutional materials in its decisions, leading to a “partial” appropriation of the fundamental rights discourse by the CJEU which emerges in a long series of judgments, and is most evident in cases such as *Omega*<sup>82</sup> and *Dynamic Medien*.<sup>83</sup> As some authors have pointed out, it is possible, in these cases, to perceive a certain concern over the “octroyée methodology of construing common constitutional traditions.”<sup>84</sup> The *Cordero Alonso* case, however, is simply one example of a case in which the CJEU has challenged judgments given by national Constitutional Courts. In the following pages I shall move to other examples of constitutional conflicts.

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<sup>81</sup> *Cordero Alonso*, Case C–81/05 at para. 41.

<sup>82</sup> *Omega*, Case C–36/02.

<sup>83</sup> Case C–244/06, *Dynamic Medien*, 2008 E.C.R. I–505.

<sup>84</sup> Marco Dani, *Tracking Judicial Dialogue—The Scope for Preliminary Rulings from the Italian Constitutional Court*, JEAN MONNET WORKING PAPER, 10/2008, available at <http://econpapers.repec.org/paper/erpjeanmo/p0207.htm> (2008). See also the reactions to the *Mangold* case (Case C–144/04, *Mangold*, 2005 ECR I–9981), Roman Herzog & Lüder Gerken, [Comment] *Stop the European Court of Justice*, available at <http://euobserver.com/9/26714> (2008). This piece is the translation of an article originally published in German, *Stoppt den Europäischen Gerichtshof*, FRANKFURTER ALLGEMEINE ZEITUNG, 8 September 2008.



*II. Conflicts due to the Dual Role Played by National Common Judges (Winner Wetten, Filipiak, Križan, Melki)*

Some of the constitutional conflicts which fall into this category are strongly related to the multiple loyalties characterizing the actors working in a multilevel context and in this respect other examples of constitutional conflicts are represented by the *Filiplik*<sup>85</sup> and the *Winner Wetten*<sup>86</sup> cases. The *Winner Wetten* case originated from a preliminary reference raised by a German court. In 2006, the German Constitutional Court acknowledged that legislation on the public monopoly on gambling on sporting competitions existing in two Länder violated Paragraph 12(1) of the Basic Law. At the same time, it decided not to declare the legislation in question unconstitutional; instead, it decided to maintain it in effect until 31 December 2007, thereby sending a “message” of sorts to the legislature to push it to intervene by that date and to amend the legislation through the use of its discretionary power, in order to save the legislation from breaching Basic Law. Despite this judgment, the CJEU decided to push the referring judge to disapply the legal provision “saved,” for a transitional period, by the German Constitutional Court. It concluded that:

By reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.<sup>87</sup>

A very similar case is *Filiplik*, which originated in a preliminary question raised by a Polish judge with regard to proceedings on tax issues between Mr. Filipiak, a Polish national engaging in economic activity in the Netherlands (where he regularly paid the social security and health insurance contributions required by Dutch legislation), and the Director of the Poznań Tax Chamber. What is interesting for the purposes of this article is that the referring court recalled a previous decision of the Polish Constitutional Tribunal. On that occasion the Polish Constitutional Tribunal had ruled that the income tax law in question infringed the principles of equality and social justice enshrined in the Polish Constitution

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<sup>85</sup> Case C-314/08, *Filiplik*, 2009 E.C.R. I-11049.

<sup>86</sup> *Winner Wetten*, Case C-409/06.

<sup>87</sup> *Id.*

but, at the same time, had decided to postpone the loss of validity of the legislation until 30 November 2008, by exploiting its powers *ad hoc*. The CJEU concluded that:

the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national Constitutional Court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.<sup>88</sup>

Another case is *Križan*,<sup>89</sup> which originated in a preliminary reference sent by the Supreme Court of Slovakia. Among other things, the *a quo* judge asked whether Article 267 TFEU requires or enables the supreme court of a Member State to use the preliminary ruling mechanism:

even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the EU framework on environmental protection and imposed the obligation to abide by the constitutional court’s legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the EU law dimension of the case concerned that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned?<sup>90</sup>

The answer given by the CJEU in this case presented further evidence of the strong conception of EU law employed by the CJEU in its relationship with national constitutional judges, stressing the autonomy to be left to the *a quo* judge to refer to the CJEU.

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<sup>88</sup> *Filipiak*, Case C–314/08.

<sup>89</sup> Case C–416/10, *Križan & Others*, (Jan. 15 2013), <http://curia.europa.eu/>.

<sup>90</sup> *Križan*, Case C–416/10 at para. 47.

The national rule which obliges the Supreme Court of Slovakia to follow the legal position of the Constitutional Court of Slovakia cannot, therefore, prevent the referring court from submitting a request for a preliminary ruling to the CJEU at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the Constitutional Court which might prove contrary to EU law.<sup>91</sup>

The need to preserve the direct relationship between the CJEU and national judges was also at the heart of a different decision, the *Melki* case.<sup>92</sup> This case originated in the reform introduced in France by Article 61–1 of the French Constitution by which the *incidenter* control of constitutionality was introduced.<sup>93</sup> This provision was implemented by Organic Law No. 2009–1523, which amended Ordinance No. 58–1067 of 7 November 1958. After this reform, Article 23–5 of the Ordinance, second paragraph, provided for the priority of the question of constitutionality over the review concerning conformity with EU Law. Doubting the compatibility of this provision with the CJEU’s jurisprudence, the French *Cour de Cassation*<sup>94</sup> referred a preliminary question to the CJEU, asking whether Article 267 TFEU precludes legislation such as that resulting from the French reform:

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<sup>91</sup> “Finally, as a supreme court, the Najvyšší súd Slovenskej republiky is even required to submit a request for a preliminary ruling to the Court of Justice when it finds that the substance of the dispute concerns a question to be resolved which comes within the scope of the first paragraph of Article 267 TFEU. The possibility of bringing, before the constitutional court of the Member State concerned, an action against the decisions of a national court, limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, cannot allow the view to be taken that that national court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU. In the light of the foregoing, the answer to the first question is that Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.” *Id.*

<sup>92</sup> “The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, *Rheinmühlen-Düsseldorf*, paragraphs 4 and 5, and *Cartesio*, paragraph 94). The lower court must be free, in particular if it considers that a higher court’s legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* 2010 E.C.R. I-0000, paragraph 32).” *Melki and Abdeli*, Joined Cases C–188/10 and C–189/10 at para. 42.

<sup>93</sup> Article 61-1 states, “If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d’État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period. An Organic Law shall determine the conditions for the application of the present article.” On this, see Federico Fabbrini, *Kelsen in Paris: France’s constitutional reform and the introduction of a posteriori constitutional review of legislation*, 9 GERMAN L.J., 1297 (2008).

<sup>94</sup> The saga is indeed multilevel: during a proceeding initiated by Mr. Melki and Mr. Abdeli, two Algerians, unlawfully present in France. They were arrested and put into detention after a police control carried out in an

in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil Constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution.<sup>95</sup>

Before the CJEU pronounced on this, the French *Conseil Constitutionnel*<sup>96</sup> had interpreted this provision in a manner consistent with the *Simmenthal*<sup>97</sup> and *Cartesio*<sup>98</sup> doctrines. In June 2010, the CJEU decided to take into account the decision of the *Conseil Constitutionnel*<sup>99</sup> which had in the meantime attempted to give an interpretation of the legislation consistent with EU law and with the CJEU’s case law. In *Melki*, the CJEU pointed out the need to respect the “essential characteristics of the system of cooperation between the Court of Justice and the national courts.”<sup>100</sup> It specified that in no case is it possible to infer from the judgment of a constitutional court declaring national legislation unconstitutional (in proceedings regarding the constitutionality of national legislation implementing a directive, for instance) the invalidity of the supranational directive, since

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area close to the Belgian border, on the basis of Art. 78–2, p. 4, of the French Code of Criminal Procedure. The judge deciding on provisional detention decided to refer to the Court of Cassation (as we know the French Constitutional Reform gave the *Court de Cassation* and the *Conseil d’État* a role of filter of the questions raised by the lower courts) a question concerning the consistency with the French Constitution of the possibility to check the identity of persons in a border area. The referring judge had in mind Art. 88-1 of the Constitution, which reads ‘The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common pursuant to the [Treaties]’, in so far as Union law ensures the absence of internal border controls for persons. The Court de Cassation deciding on the possibility to pass the question to the French Conseil Constitutionnel, aware of the consequence on European Union law of a decision like that and doubting the mechanism of the priority of the constitutional question devised by the French Reform, raised a preliminary reference to the CJEU.

<sup>95</sup> *Melki*, Joined Cases C–188/10 and C–189/10 at para.22

<sup>96</sup> Conseil Constitutionnel [French Constitutional Council], Décision no. 2010–605 DC of 12 May 2010, *available at* <http://www.conseil-constitutionnel.fr/decision/2010/2010-605-dc/decision-n-2010-605-dc-du-12-mai-2010.48186.html>.

<sup>97</sup> Case C–106/77, *Simmenthal*, 1977 E.C.R. I–62.

<sup>98</sup> Case C–210/06, *Cartesio*, 2008 E.C.R. I–9641.

<sup>99</sup> Conseil Constitutionnel [French Constitutional Council], Décision 2010-605 DC, *available at* <http://www.conseil-constitutionnel.fr/decision//decision-n-2010-605-dc-du-12-mai-2010.48186.html>. Francis Donnat, *La Cour de Justice et la QPC: chronique d’un arrêt imprévisible et imprévu*, RECUEIL DALLOZ, 1640 (2010); Federico Fabbrini, *La Corte di Giustizia si pronuncia sulla “legittimità comunitaria” del nuovo modello di giustizia costituzionale francese*, QUADERNI COSTITUZIONALI 4 (2010), Daniel Sarmiento, *L’affaire Melki: esquisse d’un dialogue des juges constitutionnels et européens sur toile de fond française*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 588 (2010).

<sup>100</sup> *Melki*, Joined Cases C–188/10 and C–189/10 at para. 51.

this would result in a violation of the *Foto Frost* doctrine.<sup>101</sup> Concluding on this typology, it is possible to recall other cases that could be traced back to this group, for instance *Chartry*<sup>102</sup> and, more recently, *A v. B.*<sup>103</sup>

*III. Conflicts over the Interpretative Monopoly Caused by an “Octroyée” Interpretation of the National Constitutional Materials (Mangold, Küçükdeveci)*

Another group of cases concerns those conflicts triggered by decisions detrimental to the interpretative sovereignty of Constitutional Courts.

The *Mangold*<sup>104</sup> case is one such example. There, in order to react to the impulse for flexible labor markets by following a framework agreement reached by the social partners, the German legislation in question authorized fixed-term employment contracts for a maximum of two years. The German legislature also added that within that maximum limit of two years, a fixed-term contract could be renewed up to three times.

The fixed-term employment contracts were accepted without the above-mentioned condition, if the worker had reached the age limit of sixty—lowered to fifty-two years in a second moment—at the commencement of his employment term. In *Mangold*, the CJEU was asked to verify the compatibility of the German law with EU Directive 2000/78, and in particular with the principle of non-discrimination on grounds of age drawn from it.

The CJEU recalled that Community law (specifically Article 6, n. 1 of the Directive) should be construed as precluding:

a provision of domestic law such as that at issue in the main proceedings which authorizes, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration

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<sup>101</sup> C-314/85, *Foto-Frost*, 1987 E.C.R. 4199 (“It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly.”).

<sup>102</sup> C-457/09, *Chartry*, 2011 E.C.R. I-00819.

<sup>103</sup> Case C-112/13, *A v. B.*, (Sept. 11, 2014), <http://curia.europa.eu/>. On the differences between *Melki* and *A v. B.*, see Andrea Guazzarotti, *Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A. c. B. e altri, sent. 11 settembre 2014, C-112/13, available at [www.diritticomparati.it](http://www.diritticomparati.it)* (2014).

<sup>104</sup> *Mangold*, Case C-144/04. See Roberta Calvano, *Il caso “Mangold”: la Corte di giustizia afferma (senza dirlo) l’efficacia orizzontale di una direttiva comunitaria non scaduta?*, available at [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it) (2006).

concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.<sup>105</sup>

The term for the implementation of the Directive had not yet expired, and in fact the *Mangold* case is interesting for the way in which the CJEU resolved the conflict between EU and national laws. The Court recalled that “during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.”<sup>106</sup>

Later, however, the CJEU seemed to “change” its parameter, shifting its focus from the Directive to general principles of Community law. This shift is confirmed by the words of the Court, in which it is evident that the conflict at stake is that between national legislation and the principle of non-discrimination on the basis of age, a principle which would find its source “in various international instruments and in the constitutional traditions common to the Member States.”<sup>107</sup>

The CJEU concluded by recalling the duty to disapply of the national judge:

It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law [...] It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.<sup>108</sup>

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<sup>105</sup> *Mangold*, Case C-144/04 at para. 78.

<sup>106</sup> *Id.* at para. 67.

<sup>107</sup> *Id.* at para. 74.

<sup>108</sup> *Id.* at paras. 77–78.

Hatzopoulos,<sup>109</sup> one of the first commentators on this judgment, read it together with other cases like *Carpenter*<sup>110</sup> and *Karner*.<sup>111</sup> These cases are all characterized by material reference to the legal material of the ECHR and to general principles. The conclusion reached by Hatzopoulos is that the mix between hard and soft law sources influences the legal reasoning of the CJEU by affecting its linearity. The CJEU cannot solve these cases by appealing to a clear legal parameter but rather has to appeal to a vague parameter (a general principle), hence why it refers to general principles and the case law of other courts (other elements sometimes testifying the lack of a strong legal reasoning of the judge) so much:

Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticised.<sup>112</sup>

However what is interesting to us is the way in which the CJEU took inspiration from national constitutional materials in order to construct this general principle.

German scholars reacted harshly to *Mangold*, questioning the viability of inferring such a principle from the constitutional traditions common to the Member States. For example, in an article published in English on *EUobserver*, Herzog and Gerken argued that:

However, this 'general principle of community law' was a fabrication. In only two of the then 25 member states namely Finland and Portugal is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof

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<sup>109</sup> Vassilis Hatzopoulos, *Why the Open Method of Coordination is Bad for You: A Letter to the EU*, 13 EUR. L. J. 309, 337 (2007).

<sup>110</sup> Case C-60/00, *Carpenter*, 2002 E.C.R. I-6279.

<sup>111</sup> Case C-71/02, *Karner*, 2004 E.C.R. I-3025.

<sup>112</sup> Hatzopoulos, *supra* note 109, at 337.

of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature.<sup>113</sup>

*Mangold* is thus emblematic of that “octroyée methodology of construing common constitutional traditions”<sup>114</sup> according to which the CJEU has been jeopardizing the interpretive sovereignty of national Constitutional Courts.

The CJEU recalled *Mangold* in *Kücükdeveci*.<sup>115</sup> There, it confirmed the existence of a general principle of non-discrimination based on age and conceived this general principle as its parameter, although the term for implementing the directive had already expired at that time. It also recalled the EU Charter of Fundamental Rights only to “prove” the later codification of this general principle despite the fact that the EU Charter was already in force at that time.

It is no coincidence that, following *Mangold*, the German Constitutional Court indirectly responded to the CJEU with the famous Lisbon decision<sup>116</sup> and then directly with the *Honeywell*<sup>117</sup> decision.

#### *IV. Constitutional Conflicts Concerning the Contrast between EU Law—as Interpreted by the CJEU—and Provisions Included in the National Constitutions (Kreil and Michanicki)*

This final category of constitutional conflicts refers to cases of judgments where the CJEU found there to be incompatibility between a national constitutional provision and EU law. The conflicts here are not conflicts of “interpretation” in a narrow sense, but rather cases of real contradiction between EU law and national law.

The most famous case which falls into this category is, perhaps, *Kreil*.<sup>118</sup> In *Kreil*, the CJEU *de facto* affirmed the prevalence of EU law over a national constitutional provision, by holding that a general exclusion of women from military posts involving the use of arms (as

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<sup>113</sup> Herzog & Gerken, *supra* note 84.

<sup>114</sup> Dani, *supra* note 84.

<sup>115</sup> Case C-555/07, *Kücükdeveci*, 2010 E.C.R. I-365.

<sup>116</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 123, 267 – Treaty of Lisbon, 2009, [https://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

<sup>117</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvR 2661/06, [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)

<sup>118</sup> Case C-285/98, *Kreil*, 2000 E.C.R. I-69.



provided for in Article 12a.4 of the *Grundgesetz*) was in conflict with the content of the Equal Treatment Directive (76/207). Subsequently, the *Grundgesetz* was amended.<sup>119</sup>

The *Kreil* decision concerned the case of Tanja Kreil who, in 1996, had applied for joining the weapons electronic maintenance service of the German Federal army. Her application was rejected on the basis of Article 12a.4 of the *Grundgesetz*, and she subsequently went before the Hannover Administrative Court, claiming that the rejection on the basis of her sex only was contrary to Equal Treatment Directive (76/207). The local court made a preliminary reference to the CJEU in order to verify the consistency of the national provisions with the Directive in question.

Another interesting case is *Michaniki*.<sup>120</sup> The *Michaniki* case stemmed from a constitutional reform of 2001, whereby Article 14 of the Greek Constitution was amended. After this reform, Article 14, paragraph 9<sup>121</sup> provided a sort of irrebuttable presumption of general incompatibility between the media sector and the sector of public contracts, in order to promote transparency in the public works sector. On the basis of this provision, a company, Michaniki AE, failed to win the contract at the end of the tendering procedure and it consequently brought an action before the Greek Council of State, which referred a preliminary question to the CJEU concerning the interpretation of Directive 93/37/EC on public works contracts. The CJEU recalled that the assessment of the compatibility of EU law with national law goes beyond its jurisdiction in preliminary ruling proceedings and also said that the Directive does not *per se* forbid a Member State from providing other exclusionary measures in order to ensure transparency and equal treatment of the tenderers if these measures are consistent with the proportionality principle.

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<sup>119</sup> Article 12a 4 states: "If, during a state of defence, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the age of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they be required to render service involving the use of arms."

<sup>120</sup> Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis and Ipourgos Epikratias*, 2008 E.C.R. I-9999.

<sup>121</sup> Article 14, p. 9 provides: "The ownership, financial standing and means of financing of the media must be disclosed, as stipulated by law. The measures and restrictions necessary to ensure full media transparency and pluralism shall be specified by law. It is prohibited to concentrate control of several media of the same or different form. In particular, it is prohibited to concentrate control of more than one electronic medium of the same form, as specified by law. The status of owner, partner, main shareholder or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder or management executive of an undertaking which undertakes with the State or a legal person in the public sector in the broad sense to perform works or provide supplies or services. The prohibition in the previous subparagraph shall also extend to any form of intermediary, such as spouses, relatives or financially dependent persons or companies. A law shall set out the specific regulations, the sanctions (which may go as far as revocation of a radio or television station's licence and an order prohibiting the signature of, or cancelling, the contract in question), the system of supervision and the guarantees to prevent circumvention of the foregoing subparagraphs."

The Luxembourg Court also stated, however, that:

Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.<sup>122</sup>

Finally, it is worth noting that, in his Opinion, Advocate General Maduro used the old Article 6(3) TEU to recall how it was among the EU's obligations to respect the constitutional identity of the Member States. This, in my view, confirms that there exists a continuity between the pre-Lisbon Article 6(3) TEU and the post-Lisbon Article 4(2) TEU.

#### F. On the Future of Constitutional Conflicts

My final thoughts thus concern the issue of constitutional conflicts in a context that is characterized by a new openness towards the preliminary ruling mechanism on the part of national Constitutional Courts.

As earlier stated, the progressive openness shown by Constitutional Courts does not *per se* lead to greater cooperation with the CJEU, and this is confirmed by the fact that the CJEU is alternating between very “sensitive” decisions (those decisions based on Article 4(2) TEU, for instance)<sup>123</sup> and “muscular” decisions (the majority of decisions now, I would say). At the same time, there are many hot issues, related, for instance, to the former third pillar, where there is already precedence for some Constitutional Courts using the counter-limits weapon.<sup>124</sup>

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<sup>122</sup> *Michaniki AE*, Case C–213/07 at para. 69.

<sup>123</sup> On this case law, see Barbara Guastafarro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Y.B. Eur. L. 263 (2012).

<sup>124</sup> As we know, while in the first pillar the counter-limits bomb never exploded (and this might be seen as a confirmation of the particular strength of the interpretative position of the CJEU in this context), the third pillar knew some episodes of tension between the Constitutional Courts and the CJEU: the decisions of the Polish (*Trybunał konstytucyjny*, P 1/05, available at [www.trybunal.gov.pl/eng/index.htm](http://www.trybunal.gov.pl/eng/index.htm)) and German (*BVerfG*, 2 BvR 2236/04, available at [www.bundesverfassungsgericht.de/en/](http://www.bundesverfassungsgericht.de/en/)) Constitutional Courts (but also see the decisions of the Cypriot *Ανώτατο Δικαστήριο*, 294/2005, available at [www.cylaw.org](http://www.cylaw.org) and Czech judges *Ústavní Soud*, Pl. ÚS

Confirmation of the very real tensions existing between the CJEU and national Constitutional Courts comes from the East, and is exemplified by the moves of the Czech Constitutional Court following the *Landtová*<sup>125</sup> decision of the CJEU. In that case, the Luxembourg Court challenged the case law of the Czech Constitutional Court, by concluding that “the Ústavní soud judgment involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement.”<sup>126</sup> In reaction to this, the Czech Constitutional Court surprisingly decided to apply the *ultra vires* control, devised by the German Constitutional Court, to the CJEU’s decision; and it went on to declare the CJEU’s decision *ultra vires*.<sup>127</sup> It made this declaration without firstly referring a preliminary question to the CJEU, and this marks it as importantly different from the German case and as going beyond the menace set by the German Constitutional Court in the Lisbon decision<sup>128</sup> (and mitigated in the *Honeywell* case).<sup>129</sup> This in itself proves that conflicts are still on the everyday agenda and why some of the most evident transformations in the European legal order have been driven on by these conflicts, especially in the field of fundamental rights protection.

The use of Article 267 TFEU by Constitutional Courts does not help in overcoming these tensions between national guardians and the CJEU but this conclusion is not necessarily pessimistic.

Even going beyond the relationship between the EU and Member States it is possible to see how conflicts have played a systemic function, by favoring confrontation and change in the global context. In this sense it has been argued that it is possible to compare judgments such as *Bosphorus*<sup>130</sup> with the famous *Solange* case. According to some

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66/04, available at <http://www.usoud.cz/>), which have recalled the question of the ultimate barriers in the field of the European arrest warrant. Jan Komárek, *European constitutionalism and the European Arrest Warrant: In search of the limits of contrapunctual principles*, JEAN MONNET WORKING PAPER, 10/05 available at <http://econpapers.repec.org/paper/erpjeanmo/p0250.htm> (2005).

<sup>125</sup> Case C-399/09, *Landtová*, 2011 E.C.R. I-05573.

<sup>126</sup> *Id.* at para. 49.

<sup>127</sup> Ústavní soud [Czech Constitutional Court], judgment of 31 January, Pl. ÚS 5/12, Slovak Pensions XVII. The English translation is available at <http://www.usoud.cz/>.

<sup>128</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 June 2009, 2 BvE 2/08, [www.bundesverfassungsgericht.de/en](http://www.bundesverfassungsgericht.de/en).

<sup>129</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 26 Aug. 2010, 2 BvR 2261/06, [www.bundesverfassungsgericht.de/en](http://www.bundesverfassungsgericht.de/en).

<sup>130</sup> *Bosphorus v. Ireland*, App. No. 45036/98, (June. 30, 2005), <http://hudoc.echr.coe.int/>.

authors,<sup>131</sup> another application of the *Solange* method is the *Kadi* case,<sup>132</sup> in which, to use Zucca’s terminology, the CJEU stated the prevalence of the principle *Jura Sunt Servanda* over that of *Pacta Sunt Servanda*.<sup>133</sup>

Before concluding this article, it is worth recalling why the “constitutional conflict” will continue to play a central role in the life of the EU.

Aside from the aforementioned risks connected with open provisions like Article 4(2) TEU, other factors also confirm the centrality of conflicts. The financial crisis, for instance, has led to the introduction of some problematic clauses like that, which is included in Article 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG).

Article 3(2), in particular, sets out the need for States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”. It is debatable whether this is consistent with Article 4(2) TEU, which sets out the need to respect the national identity and constitutional structure of EU Member States. Does this Article imply a constitutional obligation for Member States? Who is in charge of respect for this Article?

Even in this case there will be an overlapping zone since the golden rule laid out in Article 3(2) will be, at the same time, both part of the TSCG and of some national constitutions, leading to the possibility of increased interpretative competition between courts.

It is not a coincidence that, more recently, Constitutional Courts (or Supreme Courts in other cases) have been progressively involved in this ambit of economic governance – an area which has traditionally been a domain of the political institutions.<sup>134</sup>

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<sup>131</sup> Antonios Tzanakopoulos, *The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments*, in *KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL* 121 (Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico eds., 2014). See also Andrea Gattini, *Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008*, 46 COMMON MKT. L. REV. 213, 234 (2009); GORDILLO, *supra* note 31, at 235–57, 311–13.

<sup>132</sup> Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission, Council, United Kingdom v. Yassin Abdullah Kadi, (July 18, 2013), <http://curia.europa.eu/>; Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation, 2008 ECR I-6351. On the *Kadi* saga, see THE MULTIFACETED ANALYSIS OF THE KADI TRIAL, *supra* note 131.

<sup>133</sup> Lorenzo Zucca, *Monism and Fundamental Rights in Europe*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1734602](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734602) (2011). A slightly different version was published in PHILOSOPHICAL FOUNDATIONS OF EU LAW 331 (Julie Dickson & Pavlos Eleftheriadis, eds., 2012).

<sup>134</sup> On this, see Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2328060](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328060) (2013);

More generally, the contemporary significance of conflicts can be confirmed by the legacy (one might say, the aftermath) of the mega-constitutional politics of the period of the Conventions. This point has been raised by Roberto Bin: “The Constitutional Treaty has discovered a nerve – that of constitutional symbolism – using “words” that have come to recall dangerous and misleading domestic analogies (law, constitution, Minister), causing real worry about the existence of a plan to transform the EU into a state.”<sup>135</sup> This argument relies on the scholarship<sup>136</sup> that views the silence present in constitutions (referring to elements “of dormant suspension”<sup>137</sup>) positively, since silence could serve as a way to avoid the emergence of conflicts. On this view, “abeyances are valuable, therefore, not in spite of their obscurity, but because of it”,<sup>138</sup> since they are essential in order to “preserve constitutional settlements from conflicts and crises.”<sup>139</sup>

In other words, the periods of the Conventions would have broken a sort of silent pact between the EU and its Member States, recalling dangerous (for the states’ sovereignty) analogies and paving the way for new conflicts.

This reconstruction captures only a part of the phenomenon: conflicts have always been a part of the EU constitutionalization process, even when some “F-words” had not been pronounced; but, of course, the fear of the domestic analogy is at the heart of some judgments of the German Constitutional<sup>140</sup> Court, especially after the *Lissabon Urteil*.<sup>141</sup> As

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Giacomo Delledonne, *Financial Constitutions in the EU: From the Political to the Legal Constitution?*, SANT’ANNA LEGAL STUDIES (STALS) RESEARCH PAPER 5/2012, <http://stals.sssup.it/files/Delledonne%20Stals%205%202012.pdf> (2012).

<sup>135</sup> Roberto Bin, *Gli effetti del diritto dell’Unione nell’ordinamento italiano e il principio di entropia* 363, 372–73 (2010), [http://www.robertobin.it/articoli/scritti\\_modugno.pdf](http://www.robertobin.it/articoli/scritti_modugno.pdf).

<sup>136</sup> MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS: GAPS, ‘ABEYANCES’, AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT* 198 (1989).

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.* 10.

<sup>139</sup> Leonardo Pierdominici, *Fear of activity, fear of activism, the silence of courts. The docket and the legitimacy of the ECJ and its “Passive Virtues”*, paper presented at the seminar ‘Comparative Law and Comparative Institutional Analysis’, European University Institute, 23 April 2012. On file with Author.

<sup>140</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 28 Feb. 2012, 2 BvC 4/10 and BVerfG, 2 BvE 8/11. “It is in this sense that integration cannot be well understood as an autonomously “constitutional” phenomenon in its own right, as some of integration’s most fervent advocates like to maintain. Rather, despite the EU’s extensive normative power, the process of integration lacks the autonomous capacity to legitimize itself in democratic and constitutional terms. For that, the integration process still very much needs the nation-state and national constitutional oversight, whether legislative, executive, or judicial. The most recent decision of the German Federal Constitutional Court regarding national-parliamentary oversight is simply a concrete expression of this continuing dependence.” Peter Lindseth, *National parliaments in European integration: Europeanization,*

I have argued, conflicts belong to the life of constitutional polities. This has been demonstrated by scholarship in sociology and political science, and particularly with regard to social conflicts.<sup>142</sup> But conflicts also belong specifically to the *essence* of constitutionalism, which has a ‘polemical’ (and not irenic) nature, since it is founded on a never-ending friction between liberty and power, as Luciani wrote.<sup>143</sup> This indicates that the mega-constitutional politics of the period of the Conventions has not only failed to magically solve (and indeed it could not) all the democratic problems of the EU, but, on the contrary, has opened another “fracture”. This could have serious effects on the future of the EU, paving the way for possible new conflicts and confirming, therefore, the ‘polemical’ spirit of European constitutional law.<sup>144</sup>

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*renationalization, or reconciliation?* (2012), available at <http://eutopialaw.com/2012/03/01/national-parliaments-in-european-integration-europeanization-renationalization-or-reconciliation/>.

<sup>141</sup> 123 BVERGE 267.

<sup>142</sup> JACK KNIGHT, *supra* note 74; ALESSANDRO PIZZORNO, *LE CLASSI SOCIALI* (1959); ALESSANDRO PIZZORNO, *LE RADICI DELLA POLITICA ASSOLUTA* (1993); COLIN CROUCH & ALESSANDRO PIZZORNO, *CONFLITTI IN EUROPA* (1977); Ralf Dahrendorf, *Toward a Theory of Social Conflict*, 2 J. CONFLICT RESOL. 170 (1958); RALF DAHRENDORF, *ESSAYS IN THE THEORY OF SOCIETY* (1968).

<sup>143</sup> Massimo Luciani, *Costituzionalismo irenico e costituzionalismo polemic* (2006), available at [http://archivio.rivistaaic.it/materiali/anticipazioni/costituzionalismo\\_irenico/index.html](http://archivio.rivistaaic.it/materiali/anticipazioni/costituzionalismo_irenico/index.html).

<sup>144</sup> GIUSEPPE MARTINICO, *LO SPIRITO POLEMICO DEL DIRITTO EUROPEO. STUDIO SULLE AMBIZIONI COSTITUZIONALI DELL'UNIONE* (2011).



## The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession

By Francesco Cherubini\*

### A. Introduction

The jurisdictional control systems (or, to be more accurate, the quasi-jurisdictional control systems) created within the European Convention on Human Rights (ECHR)<sup>1</sup> and the European Union (EU)<sup>2</sup> considerably differ one from each other, besides reflecting the different origin of the treaties in which they have been fashioned; the first, in fact, is a “third system” with respect to States Parties, a system whose unique competence is the subsidiary protection of fundamental rights; the second is instead in charge of safeguarding the uniform implementation and interpretation of norms being mainly targeted at the creation of an Area of Freedom, Security and Justice, developed from the original idea of a “common market” envisaged in the 1957 Treaty of Rome.

Admittedly, the contact between the then European Economic Community (EEC) and human rights happened almost accidentally, when the Court of Justice (CJEU) assumed competence over the latter in order to avoid serfdom to domestic judges, and specifically to Constitutional Courts. Since 1965, when the Italian Constitutional Court first outlined the theory of “counter-limits” in the *Acciaierie S. Michele* ruling,<sup>3</sup> the CJEU has radically

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and entered into force on 3 September 1953, UNTS, vol. 213, 221.

<sup>2</sup> As is commonly known, the process of European integration (apart from sector-based treaties, such as the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community) started with the Treaty of Rome (Treaty Establishing the European Economic Community, adopted Rome 25 March 1957 and entered into force 1 January 1958, UNTS, vol. 294, 17), then coupled with the Treaty on European Union, adopted Maastricht 7 February 1992, OJ 1992 C 191/1, both lastly modified by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed Lisbon, 13 December 2007, OJ 2007 C 306/1.

<sup>3</sup> Judgment of the Italian Constitutional Court of 27 December 1965, no. 98, *Acciaierie S. Michele*, IL FORO ITALIANO, vol. I, 8 (1966). On this point, see Ugo Villani, I diritti fondamentali tra Carta di Nizza, *Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea*, IL DIRITTO DELL'UNIONE EUROPEA, 73 (2004), now in UGO VILLANI, STUDI SU LA PROTEZIONE INTERNAZIONALE DEI DIRITTI UMANI 131, 132 (2005).



modified its case law, introducing human rights into the (then) community law and taking upon itself the competence to assess the conformity of the (then) community acts with such rights.<sup>4</sup>

From then on, the issue of the protection of human rights in community law (and then in EU law) has marked a share of the debate on the potential developments of European integration, even though the major efforts have been concentrated on how to guarantee respect of the democratic principle.<sup>5</sup> In fact, the circle connecting the law-making process and its source of legitimacy – popular sovereignty – was still far from coming full, for two main reasons. First, the European Parliament (EP) – the institution representing that popular sovereignty – did not participate in the legislative process, instead only being assigned a merely advisory role. Second, the very nature of the EP, whose members were not elected by direct universal suffrage, was problematic. The resulting so-called “democratic deficit”, which characterized the original institutional structure of the EEC, was filled, though only partially, by the introduction of direct elections to the EP in 1976<sup>6</sup> (firstly implemented during the elections of 1979) and by the strengthening of its powers (perfected with the Maastricht Treaty), in particular by the adoption of the co-decision procedure.

Following the consolidation of this process – and particularly following the codification of the human rights-related jurisprudence of the CJEU, introduced by the Maastricht Treaty<sup>7</sup> – and with a view to its further enhancement, attention has been directed to the system of rights protection.<sup>8</sup> This has involved determining the formal inclusion of a binding catalogue of rights in the treaty framework (which only occurred with the reform of Article 6 TEU introduced by the Lisbon Treaty),<sup>9</sup> on the one hand, and the development of a

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<sup>4</sup> Case 29–69, *Erich Stauder v. Stadt Ulm – Sozialamt*, 1969 E.C.R. 419.

<sup>5</sup> See Ugo Villani, *Principi democratici e diritti fondamentali nella “Costituzione europea,”* LA COMUNITÀ INTERNAZIONALE 643 (2005).

<sup>6</sup> See decision of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, 76/787/ECSC, EEC, Euratom, OJ 1976 L 278/1.

<sup>7</sup> Article F(2) of the Maastricht Treaty reads, “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

<sup>8</sup> See, at the outset, European Commission, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210 final 2 May 1979, BULLETIN OF THE EUROPEAN COMMUNITIES, 1 (Supplement 2/79).

regulation aimed at bridging the EU legal order and the specialized system of human rights protection centered on the European Court of Human Rights (ECtHR), on the other.<sup>10</sup>

Pending the conclusion of the process of EU accession to the ECHR, which was initially ruled out by the CJEU<sup>11</sup> and then made feasible by the Lisbon Treaty reform of Article 6 TEU,<sup>12</sup> the interplay between the two Courts has been inspired by a tendency to avoid open conflicts on the occasion of decisions involving adjudication on the scope of fundamental rights.<sup>13</sup> Since the EU is not yet party to the ECHR, what is seen more ostensibly than open conflict is State Parties difficulty with compliance when the courts of the EU and ECHR legal systems take different stances on an issue.

In the following pages, we will outline the relationship between the two Courts in three different scenarios: I) prior to the EU's accession to the ECHR; II) following the (possible) accession; and III) pending the accession process, particularly in the light of the negative opinion given by the CJEU in December 2014.

## **B. The Relationship Between Luxembourg and Strasbourg**

### *I. Pre-Accession*

In the vast majority of cases thus far, the CJEU has sought to avoid the risk of conflict. This has often inspired an alignment of its interpretation of human rights with the jurisprudence of the Strasbourg Court; one may bear in mind, in this context, the ruling in the *Baustahlgewebe GmbH v. Commission* case.<sup>14</sup> There, the CJEU aligned its case law to

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<sup>9</sup> The Charter of Fundamental Rights of the European Union was solemnly proclaimed at Nice by the EP, the Council, and the Commission on 7 December 2000 (OJ 2000 C 364/1). A second version of the Charter (with few modifications) was then again proclaimed by the same institutions at Strasbourg on 12 December 2007 (OJ 2007 C 303/1), with a view to the entry into force of the Lisbon Treaty, whose Article 1(8) has replaced Art. 6 TEU so as to make the Charter binding ("[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties," (emphasis added)).

<sup>10</sup> Article 6(2) TEU reads: "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." On alternative (and then set aside) solutions, different from the accession, see Jean Paul Jacqu , *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, COMMON MKT. L. R. 995, 998 (2011).

<sup>11</sup> See Advisory Opinion 2/94 of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759.

<sup>12</sup> See *supra* footnote 10.

<sup>13</sup> See PAUL GRAGL, *THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 50 (2013).

<sup>14</sup> Case C185/95, *Baustahlgewebe GmbH v. Commission of the European Communities*, 1998 E.C.R. I-8417.

the jurisprudence of the ECtHR not only regarding the reasonable duration of legal process, but also regarding Article 41 ECHR – the provision that foresees the possibility for the ECtHR to afford just satisfaction to the applicant whose fundamental rights have been violated. In fact, the CJEU reduced the amount of the fine which had initially been imposed on the appellant by the (then) Court of First Instance, following its decision that the procedure before that Court had violated Article 6 ECHR.

Another case worthy of mention is the ruling in *Krombach v. Bamberski*,<sup>15</sup> in which the CJEU recalled the Strasbourg jurisprudence on the right of every person charged with an offence to be effectively defended by a lawyer. It did so in order to endorse the possibility for a domestic judge to deny the enforcement of a ruling passed by a judge of another State on the basis of Article 27(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.<sup>16</sup>

Another significant example is the *Carpenter* judgment,<sup>17</sup> in which the CJEU resorted to the case law of the Strasbourg Court on Article 8 ECHR (right to respect for private and family life) to declare that the removal of a third country national, married to a provider of services who was a national of a Member State, was contrary to Article 49 TEC (freedom to provide services).

More recently, and stressing the necessity of jurisdictional supervision over the United Nations Security Council system of targeted sanctions against alleged Al-Qaeda terrorists, the CJEU invoked the Strasbourg jurisprudence which made the same point, and it considered the inadequacy of that system of sanctions with particular reference to the effectiveness of its judicial review.<sup>18</sup>

Whilst these cases are all instances of CJEU deference to – or alignment with – the Strasbourg Court, there are, at the same time, also instances of ECtHR deference to the Luxembourg Court. This can be noticed in its numerous cross-references to CJEU jurisprudence, used *ad adiuvandum*, such as the one concerning the non-retroactivity of judicial decisions to the detriment of the principle of legitimate expectation,<sup>19</sup> and that regarding the notion of “civil right” set forth in Article 6 ECHR, in which the ECtHR made

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<sup>15</sup> Case C-7/98, Dieter Krombach v. André Bamberski, 2000 E.C.R. I-1935.

<sup>16</sup> According to which “[a] judgment shall not be recognised: 1) if such recognition is contrary to public policy in the State in which recognition is sought.”

<sup>17</sup> Case C-60/00, Mary Carpenter v. Secretary of State for the Home Department, 2002 E.C.R. I-6279.

<sup>18</sup> Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, European Commission and Others v. Yassin Abdullah Kadi, 2013 E.C.R. 518.

<sup>19</sup> Eur. Court H.R., Marckx v. Belgium, Judgment of 13 June 1979, Series A, No. 31.

explicit mention of the notion of “public service” elaborated by the CJEU.<sup>20</sup> Most importantly, this deference is demonstrated by the great caution exercised by the ECtHR when ruling on EU actions, which, of course, fall virtually outside its jurisdiction. Indeed, although the ECtHR has (rightly) always avoided any direct judicial review of EU acts, it has sometimes found itself adjudicating on the conduct of EU Member States implementing EU legislation. At such times, the Strasbourg Court has, on one hand, resorted to self-restraint, by elaborating the “equivalent protection” criterion (which, where not satisfied, opens to an indirect judicial review of EU law);<sup>21</sup> on the other hand, the ECtHR did not even acknowledge the prerequisites of this criterion, consequently proceeding with such an indirect judicial review very rarely.<sup>22</sup>

In reality, as legal scholars have emphasized,<sup>23</sup> there have been cases in which the attitude of reciprocal deference manifested by the two Courts has given way to an evident contrast between their interpretations of certain human rights. This occurred, at least initially, with reference to the extension of the right to respect for private and family life to business premises, which was excluded by the Luxembourg Court and subsequently upheld by the Strasbourg Court.<sup>24</sup> It also happened in relation to the prohibition to disclose information on foreign medical clinics practicing abortion, which was deemed legitimate by the CJEU in the light of the dispositions on the free movement of services, but was judged illicit by the ECtHR, on grounds of conflict with Article 10 ECHR.<sup>25</sup> Finally, a conflict has emerged between the two Courts over the issue of the impossibility for parties to submit written observations in response to the Advocate General’s submissions. Whilst the Luxembourg

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<sup>20</sup> Eur. Court H.R., *Pellegrin v. France*, Judgment of 8 December 1999, Reports of Judgments and Decisions 1999–VIII.

<sup>21</sup> Eur. Court H.R., *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Judgment of 30 June 2005, Reports of Judgments and Decisions 2005–VI, and, quite before it, Eur. Comm. H.R., *M. & Co. v. Germany*, Decision of 9 February 1990, Decisions and Reports 64. On this issue see Alessandra Gianelli, *L’adesione dell’Unione europea alla CEDU secondo il Trattato di Lisbona*, IL DIRITTO DELL’UNIONE EUROPEA 678, 681 (2009); Nicola Napolitano, *L’evoluzione della tutela dei diritti fondamentali nell’Unione europea*, in LA TUTELA DEI DIRITTI UMANI IN EUROPA 3, 40 (Andrea Caligiuri, Giuseppe Cataldi, & Nicola Napolitano eds., 2010).

<sup>22</sup> To tell the truth, the ECtHR has scrutinized indirectly EU law only in cases where Member States had a certain discretionary power in implementing it. See Eur. Court H.R., *Matthews v. United Kingdom*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999–I.

<sup>23</sup> Villani, *supra* footnote 3, at 152.

<sup>24</sup> See, respectively, Joined Cases C–46/87 and C–227/88, *Hoechst AG v. Commission of the European Communities*, 1989 E.C.R. 2859, and Eur. Court H.R., *Niemitz v. Germany*, Judgment of 16 December 1992, Series A, No. 251–B.

<sup>25</sup> See Case C–159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, 1991 E.C.R. I–4685; see Eur. Court H.R., *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A, No. 246–A.

Court has held this to be in line with the right to a fair hearing, in a similar case (concerning the reply to an opinion of the Public Prosecutor before the Belgian Court of Cassation), the Strasbourg Court declared it to be contrary to the right to adversarial proceedings.<sup>26</sup>

The risk of divergent interpretations, albeit not destined to materialize systematically, has not been erased by the Charter of Fundamental Rights of the EU, which became binding following the entry into force of the Lisbon Treaty. Article 52(3) of the Charter<sup>27</sup> does not guarantee with absolute certainty the complete consistency of the jurisprudence of the CJEU with that of the ECtHR.<sup>28</sup> As is well known, the criterion of the more extensive protection is not always a feasible way to resolve a contrast deriving from the potentially different scopes of the conflicting human rights in question. In fact, they are often in a relation of reciprocal opposition, so that a broader expansion of one right implies a heavier limitation of the other (one may consider, for example, the interplay between freedom of expression and the right to privacy),<sup>29</sup> thus rendering the criterion of the more extensive protection an indecisive one.

## *II. Accession Scenarios*

Confronted with this situation, which is at most inadequate to guarantee the full respect of human rights by the EU (and by its Member States, when implementing EU law), its Members opted, after a long and laborious route, for (EU) accession to the ECHR. This was going to be regulated, at first, by the Draft Revised Accession Agreement elaborated by the EU and the Council of Europe.<sup>30</sup> It raises the question of the kinds of effects that accession would have had on the relationship between the two Courts, and of whether accession, as set out in the Agreement, was capable of finally and completely settling the existing lack of external control over the respect of human rights by the Union.

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<sup>26</sup> See Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 E.C.R. I-665; see Eur. Court H.R., *Vermeulen v. Belgium*, Judgment of 20 February 1996, Reports of Judgments and Decisions 1996-I.

<sup>27</sup> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

<sup>28</sup> See Villani, *supra* note 3, at 151.

<sup>29</sup> *Id.* at 159.

<sup>30</sup> *Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, in *Fifth Negotiations Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Final report to the CDDH, 10 June 2013, 47+1(2013)008rev2, at 4, available at [www.coe.int/cddh](http://www.coe.int/cddh).

EU accession to the ECHR has unquestionable advantages that, nonetheless, presuppose a new balance of interplay between the two Courts. The relationship between the two Courts could not, for instance, only be based on so-called “cross-fertilization”, even if this has been and will be fundamental. Whilst the two Courts would continue to influence each other, from the moment of accession the last word would surely rest with the Court of Strasbourg, and it would be for the EU to implement its judgments under the supervision of the Committee of Ministers. This is a fundamental premise, since the norms of the ECHR – to which Member States have resolved to make the EU accede and which acknowledge the ECtHR as ultimate judge of human rights norms – do away with any doubt as to the “supremacy” of the Court of Strasbourg. It suffices to look at the effect of the Strasbourg jurisprudence on the legal systems of Member States to understand that the latter have undergone adjustments to comply with the former and not vice versa. As far as Italy is concerned, for example, one may mention, among many instances, the case law regarding the reasonable duration of process,<sup>31</sup> the case law concerning the so-called reverse accession in the expropriation procedure,<sup>32</sup> and, perhaps even more significantly, the case law on the overturning of final decisions following a later ruling by the ECtHR.<sup>33</sup>

Nevertheless, the “primacy” of the ECHR system should not be exaggerated. On one hand, the ECtHR, as it is commonly known, has a subsidiary nature, with the primary responsibility for the enforcement of human rights norms resting on High Contracting Parties. On the other hand, Strasbourg judges have the use of a tool that allows them to avoid imposing excessive pressure on the monitored legal orders (included the EU one), providing national (and Union) authorities with a relevant discretionary space, or – in other words – with a margin of appreciation. After all, in case of irreparable conflicts (that in any case happen very rarely), the constitutional jurisprudence of domestic courts has deemed it possible to resort to the theory of counter-limits, even towards the ECHR, as interpreted by the Court of Strasbourg. This happened recently – and, as far as we know, for the first

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<sup>31</sup> See Michelangelo Scalabrino, *L'irragionevole durata dei processi italiani e la L. 24 marzo 2001, n. 89: un commodus discessus*, RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO 365 (2001); Anton Giulio Lana, *I tempi del processo e l'equa riparazione a quattro anni dall'entrata in vigore della c.d. legge Pinto*, in LA TUTELA INTERNAZIONALE DEI DIRITTI UMANI. NORME, GARANZIE, PRASSI 496 (Laura Pineschi ed., 2006).

<sup>32</sup> See Ugo Villani, *L'occupazione acquisitiva dinanzi alla Corte europea dei diritti dell'uomo*, STUDI SULL'INTEGRAZIONE EUROPEA 23 (2006).

<sup>33</sup> Andrea Saccucci, *Obblighi di riparazione e revisione dei processi nella Convenzione europea dei diritti umani*, RIVISTA DI DIRITTO INTERNAZIONALE 618 (2002); Pietro Pustorino, *Esecuzione delle sentenze della Corte europea dei diritti umani e revisione dei processi penali: sviluppi nella giurisprudenza italiana*, DIRITTI UMANI E DIRITTO INTERNAZIONALE 678 (2007); Marina Castellaneta, *La riapertura dei processi penali a seguito di pronunce della Corte europea dei diritti dell'uomo*, in STUDI IN ONORE DI V. STARACE vol. I, 59 (2008); Gli effetti del giudicato italiano dopo la sentenza n. 113/2011 della Corte Costituzionale, Roundtable with contributions by Giovanni Canzio, Roberto E. Kostoris, Antonio Ruggeri, RIVISTA AIC (2011), available at [www.rivistaaic.it](http://www.rivistaaic.it).

time – in the jurisprudence of the Italian Constitutional Court, which held that a disposition of the Finance Law 2007 on the pension calculation was compliant with the principle of fair trial, notwithstanding that the same disposition had been judged contrary to Article 6 ECHR by the ECtHR in *Maggio*.<sup>34</sup> The CJEU, which is no stranger to recourse to the theory of counter-limits, has also, as the *Kadi* case has clearly shown,<sup>35</sup> availed itself of this last-resort defense mechanism.

Having said that, the Court of Strasbourg will be able to shed light on certain aspects of EU law that are still in the shade, at least in connection with respect for human rights. There are multiple examples and they are far from being of ancillary nature. In some cases, the same competences of the CJEU within the EU represent an impediment to its supervision over the respect of such rights; in these instances, the contribution of the ECtHR (virtually the only judge enabled to hold a pronouncement) will be fundamental. This is the case of the Common Foreign and Security Policy (CFSP), a field in which the Luxembourg Court is (almost) deprived of any competence.<sup>36</sup> It is also the case of the activity of the Agencies, which with difficulty could be brought to the consideration of the Court of Luxembourg. An example is Frontex, the European Agency charged with managing operational cooperation

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<sup>34</sup> Judgment of the Italian Constitutional Court of 28 November 2012, n. 264, RIVISTA DI DIRITTO INTERNAZIONALE, 616 (2013), with a comment of Benedetto Conforti, *La Corte costituzionale applica la teoria dei controlimiti* (see also Pietro Pustorino, *Corte costituzionale, CEDU e controlimiti*, GIURISPRUDENZA ITALIANA 769 (2013)); Eur. Court H.R., *Maggio and others v. Italy*, Judgment of 31 May 2011.

<sup>35</sup> Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6351. On the use of counter-limits by the CJEU see, among others, Juliane Kokott & Christoph Sobotta, *The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?* EUR. J. INT'L L. 1015, 1017 (2012).

<sup>36</sup> According to Article 24(1) TEU, “[...] [t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [in matters of CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.” Article 40 TEU refers to the dividing line between CFSP and the remaining competences of the EU (“[t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter”); Article 275 TFEU to the “restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”—measures whose implementation is devolved upon Article 215 TFEU (“1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities [...]).

at the external frontiers of EU Member States, and that, as further proof of the powerlessness of the CJEU, has only recently been subject to an investigation by the European Ombudsman – which highlighted the non-compliance with human rights of certain aspects of its activities.<sup>37</sup>

In other cases, the jurisprudence of the Court of Luxembourg has caused concern regarding its conformity with human rights, meaning that an external check by the Court of Strasbourg would be useful here too. One may think of the case law concerning the standing of natural and legal persons to challenge EU acts, often accused – even by the same Advocates General of the CJEU – of curtailing the right to jurisdictional protection of rights;<sup>38</sup> or, again, of the jurisprudence on the direct effect of EU rules that, at least with regard to directives, has been narrowed by the CJEU so as to cover only vertical legal relationships, leading to a potential violation of the non-discrimination principle;<sup>39</sup> or, eventually, of the case law on the illegitimacy of a norm of EU secondary law in contrast with a disposition set forth in an EU agreement, which the CJEU has made contingent upon the circumstance in which the latter is provided with direct effect.<sup>40</sup>

Nonetheless, EU accession would also imply some risks linked to the new relationship in which the two Courts would find themselves. First of all, notwithstanding all the precautions set out in the Draft Revised Accession Agreement, one may not exclude that the Court of Strasbourg could interfere in the structure of the division of competences between the EU and its Member States. Indeed, the co-respondent mechanism does not fully protect against this risk; Article 3(5) of the Draft Revised Accession Agreement foresees the putting in place of a filtering mechanism by the Court of Strasbourg which, in accepting a request of a High Contracting Party to become co-respondent, would have to consider whether some criteria (set out in Article 3, paragraphs 2 or 3 as appropriate) are met.<sup>41</sup> The ECtHR would, in other words, determine whether an alleged violation by a

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<sup>37</sup> On this point we take the liberty to refer to our *La cooperazione fra Unione europea e paesi del Nordafrica nella lotta all'immigrazione irregolare*, in *ATLANTE GEOPOLITICO DEL MEDITERRANEO* 15 (Francesco Anghelone & Andrea Ungari, 2014).

<sup>38</sup> UGO VILLANI, *ISTITUZIONI DI DIRITTO DELL'UNIONE EUROPEA* 345 (3 ed. 2013).

<sup>39</sup> *Id.* at 287.

<sup>40</sup> *Id.* at 354.

<sup>41</sup> “When deciding upon such a request [to become co-respondent], the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.” According to para. 2, “[w]here an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been



Member State results from the implementation of an obligation imposed by the Union, or whether an alleged violation by the EU is consequential on the implementation of an obligation stipulated in the Treaties, which have been agreed upon by Member States. This means that the ECtHR could incidentally end up evaluating the division of competences between the EU and its Member States, which is exactly what the Draft Revised Accession Agreement seeks to avoid.

In addition, proceedings regarding alleged violations by the EU would last longer than those regarding potential breaches by Member States. Indeed, in instances in which the conduct of the EU could not be brought directly before the Luxembourg judges to challenge its compatibility with human rights,<sup>42</sup> and in which there is then eventually resort to the subsidiary protection under the ECHR, it would be necessary to satisfy not only the prerequisite of the full exhaustion of domestic remedies but also the request of a preliminary ruling before the Court of Luxembourg. Indeed, the Draft Revised Accession Agreement (Article 3(6)) stipulates that where (for whatever reason)<sup>43</sup> the case has not yet been referred for a preliminary ruling before being brought to the Court of Strasbourg, the latter shall adjourn the examination of the case to await the pronouncement of the Court of Luxembourg. All in all, (certain) proceedings involving the protection of human rights against EU breaches would have to pass through both domestic judges and the Luxembourg Court before finally reaching the Court of Strasbourg. Such lengthy proceedings would almost certainly result in a potential (and paradoxical) violation of Article 6 ECHR. And this is in the best case scenario; for the length of the process could, indeed, be further stretched by other incidental procedures, such as the deferment of the case to the Constitutional Court by a trial judge doubting that a EU act whose conformity

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avoided only by disregarding an obligation under European Union law." While paragraph 3 reads, "[w]here an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments."

<sup>42</sup> One may refer, for example, to an action for annulment against an act of the Commission on the safeguard of competition.

<sup>43</sup> The reference for preliminary ruling is not compulsory in the case of the lower courts and even, in some cases, for the upper courts, although where it is compulsory there is always the possibility that the judge will rule the matter not relevant and therefore not refer it for preliminary ruling. On this point, see VILLANI, *supra* note 38, at 373.

to human rights has been already asserted by the Luxembourg Court can also stand the domestic obstacle of “counter-limits”.<sup>44</sup>

### *III. In the Aftermath of Advisory Opinion 2/13 of the CJEU*

As is well known, the Draft Revised Accession Agreement was submitted to the scrutiny of the CJEU, which was called, by virtue of Article 218(11) TFEU, to give its opinion. Predictably, it was negative,<sup>45</sup> though the range and depth of the doubts expressed by the Court of Justice was unexpected. However, in the Opinion handed down by the CJEU, it is possible, from many points of view, to discern a validation of the crucial point of the analysis presented in this article.

What emerges in the Opinion is the CJEU’s clear perception of the role that the Strasbourg Court would play upon accession. The CJEU isolates, with surgical precision, the spaces left open by the Agreement to possible intrusions of the ECtHR, acting as a judge of “last resort”. These are spaces created in the absence of a coordination between Article 53 ECHR and Article 53 of the Charter;<sup>46</sup> in the decisions with which the ECtHR decrees (i) on

<sup>44</sup> This scenario is most likely to further complicate with the entry into force of the ECHR Protocol No. 16 that allows Constitutional Courts (and, more generally, high courts and tribunals indicated by the High Contracting Parties) to request the Strasbourg Court to give advisory opinions in the context of a case pending before them.

<sup>45</sup> Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), <http://curia.europa.eu/>. For the first comments, see Sionaidh Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, U.K. CONSTITUTIONAL LAW BLOG, available at [ukconstitutionallaw.org](http://ukconstitutionallaw.org) (2014); Henri Labayle, *La guerre des juges n’aura pas lieu. Tant mieux? Libres propos sur l’avis 2/13 de la Cour de justice relatif à l’adhésion de l’Union à la CEDH*, RESEAU UNIVERSITAIRE EUROPEEN DEDIE A L’ETUDE DU DROIT DE L’ESPACE DE LIBERTE, SECURITE ET JUSTICE, available at [www.gdr-elsj.eu](http://www.gdr-elsj.eu) (2014); Tobias Lock, *Oops! We did it again—the CJEU’s Opinion on EU Accession to the ECHR*, VERFBLOG, available at [www.verfassungsblog.de](http://www.verfassungsblog.de) (2014); Walther Michl, *Thou shalt have no other courts before me*, VERFBLOG, available at [www.verfassungsblog.de](http://www.verfassungsblog.de) (2014); Steve Peers, *The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection*, EU LAW ANALYSIS. EXPERT INSIGHT INTO EU LAW DEVELOPMENTS, available at [eulawanalysis.blogspot.it](http://eulawanalysis.blogspot.it) (2014); Lucia Serena Rossi, *Il Parere 2/13 della CGUE sull’adesione dell’UE alla CEDU: scontro fra Corti?*, SIDIBLOG, available at [www.sidi-isil.org/sidiblog/](http://www.sidi-isil.org/sidiblog/) (2014); Martin Scheinin, *CJEU Opinion 2/13—Three Mitigating Circumstances*, VERFBLOG, available at [www.verfassungsblog.de](http://www.verfassungsblog.de) (2014); Simone Vezzani, *“Gl’è tutto sbagliato, gl’è tutto da rifare!”: la Corte di giustizia frena l’adesione dell’UE alla CEDU*, SIDIBLOG, available at [www.sidi-isil.org/sidiblog/](http://www.sidi-isil.org/sidiblog/) (2014).

<sup>46</sup> Opinion 2/13, 187–195, 189, which reads, “[i]n so far as Article 53 of the ECHR [stating that ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party’] essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter [‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions’], as interpreted by the Court of Justice, so that the power granted to Member States by Article 53

the request of Member States or the EU to become co-respondent,<sup>47</sup> (ii) on the apportionment of responsibility between the Union and its Member States *in the presence* of an ostensible identity of views between the latter,<sup>48</sup> (iii) on the nature of the question of law at issue in the proceedings before the ECtHR which, if identical to a question which has already been solved by the CJEU, prevents the latter to be priory involved;<sup>49</sup> and finally, and most of all, insofar as the CJEU affirms that, exactly in a field which is taken away from its scrutiny – and, therefore, in which the ECtHR can play an incisive role, *in respect to the protection of human rights* –, the exclusive nature of the control the latter would exercise could jeopardize “the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.”<sup>50</sup>

The Opinion of the CJEU, aside from its content (which is destined to create many problems on the way to the accession), has many chances to negatively influence *even the current* relationship between the two Courts, most of all due to the *animus* it shows. As legal scholars have not failed to point out,<sup>51</sup> the horizon perhaps conceals a break in the spirit of reciprocal deference that, as we earlier noted, has characterized their relationship. This could involve, firstly, the possible desertion, by the Court of Strasbourg, of the doctrine of equivalent protection, which has, thus far, prevented it from scrutinizing (indirectly) acts of the Union. Moreover, it has to be considered that this “narcissistic” Opinion has been delivered by the CJEU in the midst of what is a very critical climate for the Union, whose detractors have now been supplied with another element of disapproval: the fact of facing a legal order which shelters behind its uniqueness, certified by “its” Court, with the purpose of escaping an external system of control – a system which, on the contrary, has been accepted, and with many advantages for the protection of human rights, by the very same States which have given life to the European legal order.

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of the ECHR is limited [...] to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised”, emphasis added.

<sup>47</sup> *Id.* at 222–25, 224 (“[...] in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.”).

<sup>48</sup> *Id.* at 229–35.

<sup>49</sup> *Id.* at 236–41.

<sup>50</sup> *Id.* at 249, 257.

<sup>51</sup> Rossi, *supra* note 45. On this point see, e.g., Olivier De Schutter, *Bosphorus Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention*, in *THE EU ACCESSION TO THE ECHR 177* (Vasiliki Kosta, Nikos Skoutaris, & Vassili P. Tzevelekos eds., 2014).

## The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System

By Maria Dicosola,<sup>\*</sup> Cristina Fasone,<sup>\*\*</sup> & Irene Spigno<sup>\*\*\*</sup>

### A. Preliminary Remarks

On 2 October 2013, Protocol No. 16 to the European Convention on Human Rights (ECHR) was opened for signature by the Member States of the Council of Europe (CoE). The protocol, that has so far been signed by sixteen States and ratified by Albania, Georgia, Lithuania, San Marino and Slovenia,<sup>1</sup> will enter into force in case of ratification by at least ten Member States. If the protocol becomes effective, it will expand the European Court of Human Rights' competence to give advisory opinions<sup>2</sup> upon request by domestic high courts and tribunals.

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<sup>1</sup> According to the chart of signatures and ratifications, as of 20 April 2015 and since the date of opening for signatures, Albania, Armenia, Estonia, Finland, France, Georgia, Italy, Lithuania, the Netherlands, Norway, Romania, San Marino, Slovakia, Slovenia, Turkey, and Ukraine had signed Protocol no. 16, while Albania, Georgia, Lithuania, San Marino, and Slovenia also ratified it.

<sup>2</sup> Prior to the adoption of the protocol, a very limited advisory competence was already conferred on the Court, on the basis of Article 47 ECHR. However, an advisory opinion could be requested only by the Committee of Ministers and could be delivered by the Court only on issues not involving the interpretation of the rights provided in the Convention. The strong limits, *ratione personae* as well as *ratione materiae*, in order to request and obtain an opinion, made the clause ineffective: in fact, since the adoption of the Convention, the Court has only delivered two opinions *re* Article 47. On this point, see Kanstantsin Dzehtsiarou & Noreen O'Meara, *Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for dialogue and docket-control?*, 3 LEGAL STUDS. 444–68 (2014).

Indeed, the aim of the protocol is to guarantee greater involvement of domestic judges in the Convention system.<sup>3</sup> It aims at securing the correct interpretation and implementation of Convention rights through a strong interaction with the European Court of Human Rights (ECtHR). The protocol, in fact, is perfectly in line with the final *telos* of the ECHR and of the CoE in general, which was established in the aftermath of one of the most brutal conflicts in world history in order to provide legal mechanisms for the implementation of the principles of democracy, human rights, and the rule of law.

However, there is a danger that a mechanism established to fulfill such prominent objectives might collide with some concrete problematic aspects, concerning, in particular, the interaction between national and supranational judicial systems. The fulfillment of these objectives might be frustrated by possible conflicts over the competences of ordinary and Constitutional Courts, at the domestic level, as well as between constitutional judges and the ECtHR, and over the complex triangular relationship between Constitutional Courts, the ECtHR, and the Court of Justice of the European Union (CJEU), at the supranational level. In particular, the reaction of Constitutional Courts is a matter of concern. This is particularly so given that these Courts have, since the end of the Second World War, been considered to be the main actors in the protection of fundamental rights in Europe, and are now sidelined by supranational courts and by the direct relationship the latter have either with ordinary judges or citizens.

In the following article it is argued that, on the one hand, and also in the light of the experience accrued within other supranational systems, Protocol No. 16 could represent a challenge for Constitutional Courts' autonomy when dealing with constitutional review of legislation. This is because the advisory opinion mechanism might trigger a centralization in the interpretation of fundamental rights enshrined in the ECHR in the hands of the ECtHR - fundamental rights that are likewise enshrined in national Constitutions. On the other hand, the effective enforcement of the new mechanism largely relies on the attitude that will be shown by national courts, first of all by constitutional judges, as well as the ECtHR itself in using this device. In the end, not only are the Contracting Parties of the ECHR free to decide on whether to sign Protocol No. 16 and to determine which national courts constitute "highest courts and tribunals," but the (authorized) national judges also enjoy discretion about the extent to which they want to resort to the ECtHR's advisory opinions. In other words, the degree of engagement in the European judicial conversation depends primarily on national Constitutional Courts and on the extent to which they see themselves

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<sup>3</sup> As stated by the judges of the European Court of Human Rights—and in particular by François Tulkens, vice-President of the European Court of Human Rights at that time—at a Seminar held in Strasbourg, on 27 January 2012, *How can we ensure greater involvement of national courts in the Convention system?* The report of the seminar is available on the ECtHR's website at [http://www.echr.coe.int/Documents/Dialogue\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Dialogue_2012_ENG.pdf). Among the scholars, see Linos-Alexandre Sicilianos, *L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme—À propos du Protocole no 16 à la Convention européenne des droits de l'homme* 97 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 9–29 (2014).

as “agents” shaping European constitutional space.<sup>4</sup> The attitude of the ECtHR, in terms of its activism or, rather, self-restraint, in exploiting the requests for advisory opinions for strengthening its authoritative interpretation of the ECHR, can also make a critical difference.

However, for a Constitutional Court that decides to use the new mechanism, it might be difficult for it to disregard the opinion of the ECtHR, as well as the opinions rendered to other Courts on the same grounds and on similar factual situations. Given the dominant model of centralized review of legislation in Europe, this could limit the inclination of a Constitutional Court to employ the advisory opinion mechanism extensively.

Nevertheless, it cannot be neglected that Protocol No. 16 has the merit to support, at least formally, the strengthening of the relationship between the ECtHR and the highest domestic judges, albeit that it does so only in one direction. For whilst national courts seek guidance from the ECtHR on the interpretation of ECHR rights, the ECtHR cannot seek guidance from national Constitutional Courts on the interpretation of the same rights under national Constitutions.

This article aims to analyze both the strengths and the weaknesses of the new mechanism introduced by Protocol No. 16. It attempts to foresee what the attitude of Constitutional Courts vis-à-vis the new advisory opinions could be, by drawing inspiration from a comparative analysis with the practices of the preliminary reference procedure by Constitutional Courts before the CJEU and with the advisory opinion mechanism of the Inter-American Court of Human Rights (ICHR). The article proceeds as follows. Section B considers the practice of judicial interaction between domestic courts and the ECtHR. It starts from the context in which the “dialogue protocol” was drafted—a context characterized by the changing role of domestic judges in the control of conventionality and in the relationship with Constitutional Courts, in particular where constitutional review of legislation is centralized, as in most European countries. Section C then analyzes the differences and similarities of the new ECtHR advisory opinion mechanism in the light of the EU preliminary reference procedure, aiming to highlight the potential reception of the former by Constitutional Courts. Section D focuses on the jurisdiction of the ICHR to render advisory opinions upon referral by national authorities, as a case study that can allow for some predictions regarding the foreseeable impact of Protocol No. 16 to the ECHR on Constitutional Courts. Finally, Section E sets out the conclusions of this Article, and considers the results of the comparative analysis.

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<sup>4</sup> On this point, see Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this Special Issue.

## **B. Protocol no. 16 to the European Convention on Human Rights: A New Role for Domestic Judges?**

### *I. The Evolving Role of Domestic Judges in the Convention System*

The expansion of the role of domestic judges in the implementation of the ECHR, through interaction among judges as well as with the ECtHR, was already underway before the adoption of the protocol. After all, this was a legal requirement of the principle of subsidiarity, which is one of the cornerstones of the entire ECHR system.<sup>5</sup> Indeed, considering the universal dimension of human rights and the “dialogue” that is in place among judges, eminent authors have defined the Convention system as a pluralist<sup>6</sup> and cosmopolitan legal order.<sup>7</sup> According to those scholars, in this new and complex system, the relationship between institutions and sources of law is no longer based on the principle of hierarchy, but rather follows, on the contrary, the principle of heterarchy (“an interaction of different sub-orders that is not subject to common legal rules but takes a more open, political form”<sup>8</sup>), in which the judges play a central role.

However, the existing legal order is far from being perfect; it is based on a general principle the implementation of which is reserved mainly to informal and voluntary mechanisms. Indeed, it cannot be denied that domestic judges are the masters of the correct interpretation and implementation of fundamental rights, through mechanisms such as judicial interpretation and, in more problematic cases, review of domestic legislation, taking the ECHR as a standard. When performing these functions, domestic judges are often engaged in a dialogue with the European Court, whose case law is taken as a benchmark for the correct interpretation of fundamental rights. However, this dialogue is mainly indirect, is often hidden,<sup>9</sup> and is completely based on the will of national judges, who can deliberately decide to avoid any confrontation with the European judge.

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<sup>5</sup> According to Article 35(1) ECHR, “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.” This principle is even reinforced by the recently adopted Protocol no. 15 to the European Convention on Human Rights.

<sup>6</sup> On pluralism in the Convention system, see Nico Krish, *The Open Architecture of European Human Rights Law*, 11 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS (2007).

<sup>7</sup> On the ECHR as a cosmopolitan legal order, with the European Court as a “Constitutional Court,” see Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53–90 (2012).

<sup>8</sup> Nico Krish, *The Case for Pluralism in Postnational Law*, 12 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 2 (2009).

<sup>9</sup> On the cases of hidden or “implied” dialogue, see Rafael Bustos Gisbert, *XV Propositiones generales para una teoría de los diálogos judiciales*, 95 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 30–31 (2012). Although “hidden,” this still amounts to a form of engagement according to VICKY JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* Chapter 3 (2013).

In this light, this section aims to explore Protocol No. 16, not only as the first formal instrument of direct interaction between domestic judges and the ECtHR, but also as a new mechanism that can produce indirect effects on the existing functions of judges, and on the dialogue among them, for the reinforcement of fundamental rights in Europe. In analyzing the possible effects of the protocol on the system already in place, it can be observed that, despite the fact that the introduction of the protocol must be considered an undeniably crucial step in the process of the expansion of a culture of “European rights,” important problems nevertheless remain unresolved. In particular, the mechanism of judicial referral to the European Court in order to obtain advisory opinions risks adding further complexity to an already complex landscape. In this context, the realization of the risk of confusion between the functions of ordinary and constitutional courts, to the detriment of the role of Constitutional courts, could be one of the major shortcomings.

## *II. The “Dialogue Protocol”*

As was hoped for by scholars quite a long time ago,<sup>10</sup> at the 2012 Brighton Conference it was stated that:

The Conference... notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level.<sup>11</sup>

The idea that the correct implementation and interpretation of fundamental rights at the domestic level is strictly connected with a well-balanced cooperation between domestic judges and the ECtHR emerges clearly. Indeed, on the basis of these general principles, the Preamble to Protocol No. 16 states that the power to give advisory opinions upon judicial referral aims to “further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity.”<sup>12</sup>

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<sup>10</sup> Françoise Benoit-Rohmer, *Les perspectives de réformes à long terme de la Cour Européenne des droits de l’homme: “certiorari versus renvoi préjudiciel”* REVUE UNIVERSELLE DES DROITS DE L’HOMME 7–8 (2002).

<sup>11</sup> Brighton Declaration, 12.d.

<sup>12</sup> Protocol No. 16 to the ECHR, Preamble.



Therefore, with the aim of strengthening the dialogue between domestic judges and the ECtHR, Article 1.1 of the Protocol confers to the “highest courts and tribunals of a High Contracting Party” the power to “request the Court to give advisory opinions.” The courts authorized to refer shall be indicated by each Contracting Party, by means of a declaration that shall be submitted at the time of the signature or ratification of the protocol. The declaration is not binding, since Parties retain the power to modify it at any time.<sup>13</sup>

The jurisdictions authorized to seek an advisory opinion should be involved in a pending process.<sup>14</sup> This means that among the authorities indicated by the Contracting Parties, only those effectively exercising judicial power in the context of a pending process can seek an opinion from the ECtHR. Therefore, the referral has a concrete nature, with abstract review of legislation not being allowed.<sup>15</sup>

The decision of the ECtHR regarding judicial referral is not considered to be the last stage of domestic controversies. Its aim, rather, is to give an opinion only on “questions of principle relating to the interpretation or application” of the ECHR rights and freedoms.<sup>16</sup> Here, the analogy with the power of referral of tribunals to Constitutional Courts in the majority of the European systems of constitutional review of legislation is evident.

Moreover, even the task of interpreting the legal issues concerning fundamental rights protected under the ECHR is not left entirely to the ECtHR, for the decision of the Court is to be based on the legal and factual background of the pending case provided by the domestic jurisdiction.<sup>17</sup> This means that even the question of interpretation is not to be simply transferred to the ECtHR, but is to be solved on the basis of the interaction between the “preliminary” interpretation of the domestic judge and the “final” interpretation of the ECtHR. To this end, the domestic judge is to present, in particular: (i) the subject matter of the domestic case and the relevant findings of fact; (ii) the relevant domestic legal provisions and the Convention issues raised; (iii) the arguments of the parties; and (iv), the views of the domestic judge on the question.<sup>18</sup>

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<sup>13</sup> Art. 10 of the Protocol.

<sup>14</sup> Art. 1.2 of the Protocol.

<sup>15</sup> See the Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, point 10, [http://www.echr.coe.int/Documents/Protocol\\_16\\_explanatory\\_report\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf) [hereinafter Explanatory Report].

<sup>16</sup> Art. 1.1 of the Protocol, second part.

<sup>17</sup> Art. 1.3 of the Protocol.

<sup>18</sup> Explanatory Report at point 12.

When reading the text of Protocol No. 16, therefore, the aim of its drafters to reinforce the dialogue among judges in the ECHR system emerges clearly.<sup>19</sup> Nevertheless, when analyzing the possible concrete effects of its implementation, a number of doubts can be raised as to its ability to fulfill this overarching aim, as will be demonstrated in the following paragraphs.

### *III. The Impact of Protocol No. 16 to the European Convention on Human Rights on the Existing Functions of Judges and Their Interaction with Supranational Judges*

In the ECHR system, domestic judges have always had a crucial role in implementing fundamental rights,<sup>20</sup> and, when necessary, in solving the conflicts<sup>21</sup> deriving from the interaction between supranational and national sources of law. In this regard, reviewing the studies devoted to this phenomenon, it is possible to classify the functions of judges into two categories: a) interpretation of domestic legislation in conformity with the ECHR and, in the event that the conflict cannot be solved by interpretative means, b) review of domestic legislation deemed to conflict with the ECHR. The second mechanism can take two forms: (i) the control of conventionality, which is usually performed by ordinary judges, though sometimes also by Constitutional Courts, and (ii) the control of constitutionality, performed by Constitutional Courts. Protocol No. 16, which adds the power of domestic courts and tribunals to request advisory opinions from the ECtHR, introduces a new mechanism of dialogue between national judges and the ECtHR. This, however, does not appear able to correct the imperfections of the existing system of judicial interaction.

#### *1. The Impact of Protocol No. 16 on Judicial Interpretation of Domestic Legislation in Conformity with the Convention*

Following the integration of the ECHR into European legal systems, the interpretative power of domestic judges started to become more relevant.<sup>22</sup> Judicial interpretation,

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<sup>19</sup> It is not by chance that the President of the European Court of Human Rights, Dean Spielmann, in his speeches defined the protocol as “the dialogue protocol”, as pointed out, among the Italian scholars, by E. Nalin, *I protocolli n. 15 e 16 alla Convenzione europea dei diritti dell’uomo*, in *I GIUDICI DI COMMON LAW E LA (CROSS)FERTILIZATION: I CASI DI STATI UNITI D’AMERICA, CANADA, UNIONE INDIANA E REGNO UNITO 119–50* (Pamela Martino ed., 2014).

<sup>20</sup> Among the Italian scholars, a number of studies by Antonio Ruggeri are devoted to the role of judges in the multilevel system of fundamental rights. With particular reference to the effects of the adoption of Protocol No. 16 on the expansion of judicial functions, see Antonio Ruggeri, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all’adesione dell’Unione alla Cedu e all’entrata in vigore del prot. 16)*, 1 *RIVISTA DELL’ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI* (2014).

<sup>21</sup> On the crucial role of conflicts in the EU legal system, see Giuseppe Martinico, *The “Polemical” Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this Special Issue.

<sup>22</sup> According to Jan Polakiewicz, “the main responsibility for ensuring the observance of the Convention in domestic law lies with the legislature and the judiciary.” Jan Polakiewicz, *The Status of the Convention in National*

indeed, has the power to “create links between legal orders even in the absence of expressed norms of connection.”<sup>23</sup> Among the mechanisms of coordination between domestic legal systems and the ECHR, consistent judicial interpretation has, therefore, emerged as one of the most relevant, reflecting a trend similar to that of the coordination between national and supranational systems within the European Union.<sup>24</sup>

In some cases, interpretation that is consistent with the ECHR and its jurisprudence is a duty imposed on national judges by the statutes incorporating the ECHR,<sup>25</sup> as in the case of the United Kingdom<sup>26</sup> and Ireland.<sup>27</sup> In those cases where statutes do not impose such a judicial duty, Constitutional Courts often introduce this same rule.<sup>28</sup> Consequently, both types of jurisdiction usually take ECHR jurisprudence into consideration, and, as a result, ECtHR judgments are often quoted by national jurisdictions, even if they concern other states. In these cases, an obligation to take into account European and international law in judicial interpretation is usually considered by Constitutional courts to be indirectly based

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*Law, in* FUNDAMENTAL RIGHTS IN EUROPE. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000, 31-53 (Robert Blackburn & Jörg Polakiewicz eds., 2001). Alec Stone Sweet and Helen Keller add also administrative officials. Alec Stone Sweet, Helen Keller, *The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS. THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS, 3-712 (Robert Blackburn & Jörg Polakiewicz eds., 2008).

<sup>23</sup> GIUSEPPE MARTINICO & ORESTE POLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS 6 (2012).

<sup>24</sup> In this sense, see Giuseppe Martinico, *Is the European Convention Going To Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 2 EUR. J. INT'L L. 401-24 (2012).

<sup>25</sup> As Martinico points out, Art. 10 of the Spanish Constitution, Art. 20(1) of the Romanian Constitution, and Art. 5 of the Bulgarian Constitution are examples of the constitutional duty to follow the European Convention in judicial interpretation of national legislation. The case of the UK is an example of legal duty of consistent interpretation. Martinico, *supra* note 24,

<sup>26</sup> Section 3(1) of the *Human Rights Act*, indeed, provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

<sup>27</sup> Section 2.1 of the *European Convention on Human Rights Act*, in fact, states, “[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.” In so far as the incorporation of the European Convention into domestic systems is concerned, the cases of UK and Ireland are considered “relatively ‘like cases.’” See Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, in A EUROPE OF RIGHTS 34-106, *supra* at note 22.

<sup>28</sup> This happens in particular in the Baltic countries. See in particular the cases of Latvia (Constitutional Court, judgments n. 2000-03-01 of 30 Aug. 2000 and n. 2006-03-0106 of 23 Nov. 2006). All cases are cited by Martinico, *supra* note 24.

on the Constitution, and examples of this include the so-called “hinge provisions” in the German Basic Law and Article 117 of the Italian Constitution.<sup>29</sup>

The capacity of the mechanism of consistent judicial interpretation to reinforce the culture of rights in Europe is more than evident. However, the risk of conflicting interpretations of the same rights, in some cases even in the same country, is clear. Moreover, this system, being based only on the will of each court to refer to European standards and case law in the interpretation of rights, could produce asymmetries. The introduction of the ECtHR’s advisory competence, conferring on the Court a general power to give the “final interpretation”, could offer a solution to these problems. Nevertheless, requesting an advisory opinion from the ECtHR is not a duty, but a mere right of domestic courts, which may deliberately decide to forego the “European Court test.”

From this perspective, the adoption of Protocol No. 16 does not, therefore, produce any new positive effects on the existing system of interaction between the jurisprudence of the European and the domestic courts. This interaction instead remains based on a voluntary system, the effects of which can vary, depending on the will and the sensitivity of the actors involved.

However, the picture concerning the effects of the interpretation provided by the ECtHR on the case law of the domestic courts in case of ratification of the protocol might be more complicated. Indeed, Article 5 of the Protocol, according to which an advisory opinion, once adopted, is not binding, must be coordinated with point 27 of the Explanatory Report, which states that:

They [*the advisory opinions*] would, however, form part of the case law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.

Therefore although it is up to the requesting Court to decide on the effects of the opinion in the pending case,<sup>30</sup> it is quite predictable that ECtHR judgments will have a stronger effect than would be derived from Article 5 of the Protocol—or at least in those cases

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<sup>29</sup> References to the role of Constitutional Courts in the dialogue with the ECtHR can be found in the reports of the XVI Conference of the European Constitutional Courts, Vienna, Constitutional Court of Austria, 12–14 May 2014, devoted to “The cooperation of Constitutional Courts in Europe. Current situation and perspectives” (*available at* <http://www.confconstco.org>).

<sup>30</sup> Explanatory report at point 25.

where the ECtHR will adopt a decision on the basis of a “well-established” interpretation of ECHR rights<sup>31</sup>—in a way which is not completely different from the system of judicial referral to the CJEU (as it will be argued in Section C.IV).

## *2. The Impact of Protocol No. 16 on the Power of Judges to Review Domestic Legislation Deemed to Contrast with the Convention*

In cases where a sharp conflict arises between the national and the Convention systems, consistent interpretation would not offer a final solution. In such cases, and where a stronger approach is needed, the only solution may be to review national legislation deemed to contrast with the supranational norms.

With the control of conventionality, cases of conflict between national legislation and the ECHR are solved by “ordinary” domestic judges, who disregard national legislation and directly apply the ECHR provisions. This mechanism, which is based on the principle of the direct effect of supranational legislation, is particularly common in monistic countries where a system of control of constitutionality of legislation is not provided. As a result, in the hands of ordinary judges, the decentralized system of conventional review of legislation compensates for the lack of constitutional review of legislation.

This is the case, for example, of France until 2008 and the Netherlands.<sup>32</sup> Indeed, in France, where *a posteriori* constitutional review of legislation was not provided until the 2008 constitutional reform, the power of domestic judges to exercise the control of conventionality of domestic legislation, on the basis of Article 55 of the Constitution,<sup>33</sup> has been recognized by the *Conseil constitutionnel* itself. However, the *Conseil constitutionnel* refused to exercise this power, stating that constitutional judges are provided with the power of control of constitutionality, while the control of conventionality is reserved to

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<sup>31</sup> As can be derived by decision no. 49/2015 of the Italian Constitutional Court, according to which Strasbourg case-law is binding for domestic judges, only when based on an established jurisprudence. While, according to some authors, the decision is an expression of “constitutional patriotism,” intended to put strong limits on judicial interaction (Antonio Ruggeri, *Fissati nuovi paletti dalla consulta a riguardo del rilievo della CEDU in ambito interno. A prima lettura di Corte cost. n. 49 del 2015*, DIRITTO PENALE CONTEMPORANEO (2015), [http://www.penalecontemporaneo.it/upload/1427919457RUGGERI\\_2015a.pdf](http://www.penalecontemporaneo.it/upload/1427919457RUGGERI_2015a.pdf); Diletta Tega, *La sentenza della Corte costituzionale n. 49 del 2015 sulla confisca: il predominio assiologico della Costituzione sulla Cedu*, FORUM DI QUADERNI COSTITUZIONALI (2015), [http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/04/nota\\_49\\_2015\\_tega.pdf](http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/04/nota_49_2015_tega.pdf)), according to others, it is an expression of “functional disobedience,” that is a natural and positive effect of judicial dialogue (Giuseppe Martinico, *Corti costituzionali (o supreme) e “disobbedienza funzionale”*, DIRITTO PENALE CONTEMPORANEO (2015), [http://www.penalecontemporaneo.it/upload/1430150015MARTINICO\\_2015.pdf](http://www.penalecontemporaneo.it/upload/1430150015MARTINICO_2015.pdf)).

<sup>32</sup> In France, at least until the 2008 constitutional reform.

<sup>33</sup> Stating that “Treaties or agreements properly ratified or approved shall, upon their publication, have an authority superior to legislation, provided always that the relevant agreement or treaty is applied by the other party.”

ordinary judges. As a result, an extensive use of this power followed, firstly by the Court of Cassation and later also by the *Conseil d'Etat*,<sup>34</sup> and for a long time the control of conventionality was the only possible *a posteriori* review of legislation in France.

The case of the Netherlands is similar. The Constitution itself, while prohibiting any form of constitutional review of legislation,<sup>35</sup> provides for the control of conventionality of domestic legislation. Article 93 thus states that international treaties are binding, and Article 94 explicitly provides that: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." Judicial review of conventionality of legislation has, therefore, a constitutional basis in the Netherlands, even though the courts tend to use this instrument with caution, avoiding excessive interference with the powers of Parliament.<sup>36</sup>

In Belgium, the evolution of the role of judges with regard to the ECHR reflects the evolution of the attitude of the State towards international law and the progressive transformation of constitutional review of legislation in Belgium. Indeed, as far as the relationship between national and international law is concerned, until 1971 the Belgian legal system was based on the dualistic theory. However, this trend was reversed following the adoption, in 1971, by the Supreme Court of Appeal, of the judgment in *Franco Suisse Le Ski*, where, for the first time, the direct effect of international treaties was recognized. From the end of the 1970s onwards, this principle was progressively applied also with reference to the ECHR.<sup>37</sup> A decentralized system of review of statutes deemed to conflict with fundamental rights (whose recognition was based on the ECHR) therefore emerged. This trend reinforced the system of constitutional review of legislation, a power that was only gradually recognized as pertaining to the Belgian Constitutional Court.<sup>38</sup>

However, the control of conventionality is also exercised by ordinary judges in countries where there is a system of constitutional review of legislation already in place. In these cases, control of constitutionality and control of conventionality, with reference to

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<sup>34</sup> Catherine Dupré, *France*, in *FUNDAMENTAL RIGHTS IN EUROPE*, 313–33, *supra* note 22.

<sup>35</sup> Article 120 Const. states, "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

<sup>36</sup> See Erika De Wet, *The Reception Process in the Netherlands and Belgium*, in *A EUROPE OF RIGHTS*, *supra* note 22, at 229–309.

<sup>37</sup> After the adoption of the decision of the European Court of Human Rights in the case *Marckx v. Belgium*.

<sup>38</sup> The competence to review the compatibility of statutes with reference to all fundamental rights was assigned to the Belgian *Cour d'Arbitrage* only in 2003. In 2007 its name was changed to *Cour Constitutionnelle*.

fundamental rights, coexist. This is the case, for example, of Spain<sup>39</sup> and Austria,<sup>40</sup> as well as of most Central and Eastern European countries, such as Bulgaria,<sup>41</sup> Romania, and Moldova.

Judicial review of legislation in conflict with ECHR rights is very rarely applied in dualistic countries, as the case of the United Kingdom shows clearly. The Human Rights Act, in fact, confers upon judges only the power to make a “declaration of incompatibility” between the statute and the ECHR, while no power of review of legislation with regard to the ECHR is admitted, according to the principle of Parliamentary sovereignty.<sup>42</sup> Even in Italy, judicial “disapplication”<sup>43</sup> of statutes in contrast with the ECHR—on the model of the mechanism in force with reference to the EU treaties—has been stopped by the Constitutional Court, with Decisions no. 348 and 349 of 2007<sup>44</sup>.

In all the aforementioned cases, the transformative effect of the ECHR on the role of judges in domestic legal systems cannot be ignored, even though it must not be overestimated.<sup>45</sup> Apparently, these judges play the role of “watchdogs” over the correct implementation and interpretation of fundamental rights, as defined at both national and supranational levels, and, in performing this function, they sometimes tend to exercise a quasi-constitutional role. Thus, an evident effect of the ECHR is the great expansion of the powers of ordinary domestic courts, in many instances to the detriment of Constitutional Courts.

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<sup>39</sup> Article 96.1 Const. states, “Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.”

<sup>40</sup> Where the European Convention on Human Rights has been incorporated into the Constitution.

<sup>41</sup> Article 5(4) Const. provides that “International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.” However, domestic judges have shown certain self-restraint in the exercise of this power.

<sup>42</sup> Robert Blackburn, *The United Kingdom*, in FUNDAMENTAL RIGHTS IN EUROPE, 935–1008, *supra* note 22.

<sup>43</sup> Namely when a domestic statute is not applied to the case but nevertheless remains in force in the legal system.

<sup>44</sup> On the effects of the ICC 2007 judgments, see, critically, Oreste Pollicino, *The European Court of Human Rights and the Italian Constitutional Court: No “Groovy King of Love,”* in THE UK AND EUROPEAN HUMAN RIGHTS. A STRAINED RELATIONSHIP?, 361–77 (Katja S Ziegler, Elizabeth Wicks & Loveday Hodson eds., 2015)

<sup>45</sup> As Giuseppe Martinico pointed out, on one side, the judges usually make use of the power of “disapplication” of domestic legislation with caution, and, on the other, in a growing number of countries, Constitutional Courts are setting constitutional limits on the prevalence of conventional legislation over domestic statutes, on the model of the theory of counter-limits within the EU system. MARTINICO, *supra* note 24.

The power to review domestic legislation deemed to conflict with the ECHR has so far been exercised very rarely by Constitutional Courts. Austria is the most famous example of this. Austria is a monistic country, whose Constitution does not provide for a bill of rights, and, since 1964, it has been admitted that in the Austrian legal system the ECHR has constitutional status. Consequently, conflicts between domestic legislation and the ECHR can result in a declaration of unconstitutionality by the Federal Constitutional Court, while possible problems of conflict between the ECHR and the Constitution are solved according to the principle *lex posteriori derogate legi priori*.<sup>46</sup> Constitutional Courts, therefore, seem to be the main “losers” in the process of the “Europeanization” of rights under the ECHR system, and the introduction of Protocol No. 16 does not seem to have the power to reinforce their role, as will be demonstrated in the following paragraph.

#### *IV. Ordinary and Constitutional Courts in the European Convention System: Overlapping Functions*

As an effect of the multiplication of mechanisms of interaction among judges, a process of gradual overlapping of functions between ordinary and constitutional courts has been emerging in the ECHR system.<sup>47</sup> Indeed, in the absence of any specific rule at the supranational as well as the national level, both ordinary and Constitutional Courts spontaneously started to provide consistent interpretation, as well as reviewing domestic legislation deemed to contrast with the European standards.

In particular, the duty to interpret national legislation in a manner that is consistent with the ECHR and its jurisprudence is implemented indifferently by ordinary as well as Constitutional Courts.<sup>48</sup> The control of conventionality of legislation in contrast with the ECHR is a power exercised quasi-exclusively by the ordinary courts, while the power of control of constitutionality in cases of infringement of ECHR rights is very rarely exercised

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<sup>46</sup> On the effects of the European Convention on Human Rights in the Austrian legal system, see Daniela Thurnherr, *The Reception Process in Austria and Switzerland*, in *A EUROPE OF RIGHTS*, 311–86, *supra* note 22. On the consequences of the constitutional status of the European Convention in the Austrian legal system with reference to the relationship between national legislation and EU legislation, see Andreas Orator, *The decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: an instrument of leverage or rearguard action?*, in this Special Issue.

<sup>47</sup> With reference to the EU, as well as the ECHR, Antonio Ruggeri points out the risk of imbalances between ordinary courts, Constitutional courts and European courts in the system for the protection of fundamental rights in Europe. See Antonio Ruggeri, *Tutela dei diritti fondamentali, squilibri nei rapporti tra giudici comuni, Corte costituzionale e Corti europee, ricerca dei modi con cui porvi almeno in parte rimedio* (2012), available at [www.giurcost.org](http://www.giurcost.org).

<sup>48</sup> References can be found in the reports of the XVI Conference of the European Constitutional Courts, Vienna, Constitutional Court of Austria, 12–14 May 2014, devoted to “The cooperation of Constitutional Courts in Europe. Current situation and perspectives” (available at <http://www.confueconstco.org>).



by Constitutional Courts.<sup>49</sup> However, as already stated, considering the similarities with the decentralized system of control of constitutionality, the effects of control of conventionality can easily be assimilated to constitutional review of legislation of internal laws in conflict with the ECHR. As a result, the powers of ordinary and constitutional courts, in this regard, are clearly overlapping. At the same time, both ordinary and Constitutional Courts are losing most of their autonomy in deciding cases concerning fundamental rights. As a result, the role of both ordinary and constitutional judges in the European system is clearly facing a dramatic transformation.<sup>50</sup>

In this landscape, it is more than evident that there is a risk of duplication of functions between the ordinary and Constitutional Courts, with a consequent marginalization of the role of Constitutional Courts, gradually assimilated to all other apex courts, as well as asymmetries among CoE countries, due to a number of national variables, including in particular the approach to supranational law, as well as the rules on the organization of the judiciary in each legal system.

Protocol No. 16 does not seem to offer a viable solution to these shortcomings. Indeed, as already mentioned, Article 1.1 of the Protocol refers generically to the “highest courts and tribunals of a High Contracting Party.”<sup>51</sup> This choice is at the same time both exclusive and inclusive. It is exclusive since not all courts, but only those sitting at the apex of the judicial system, are authorized to request an advisory opinion. It is inclusive because, as is pointed out in the explanatory report, the term “highest” (instead of “the highest”) refers not only to constitutional and supreme courts, but also to all those tribunals that “although inferior... are nevertheless of especial relevance on account of being the “highest” for a particular category of case.” On this basis, it is to be expected that a wide range of tribunals, including also, but not only, Constitutional courts, would be authorized by the Contracting Parties to submit a request for an advisory opinion.<sup>52</sup>

With all this in mind, the request of advisory opinions may, on the one hand, generate problems of interaction between consultative and adjudicatory functions of the ECtHR (see

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<sup>49</sup> The Constitutional Court of Austria seems to be the only clear example in this sense.

<sup>50</sup> On the transformation of Constitutional Courts in the European legal order, see—among the Italian scholars—Marina Calamò Specchia, *La giustizia costituzionale, un sistema atipico in un ordinamento democratico? Spunti di riflessione sul ruolo delle Corti nei sistemi costituzionali aperti*, in ALLE FRONTIERE DEL DIRITTO COSTITUZIONALE. SCRITTI IN ONORE DI VALERIO ONIDA (Marilisa D’Amico & Barbara Randazzo eds., 2011).

<sup>51</sup> Art. 10 of the Protocol.

<sup>52</sup> As can be derived from the choice of Romania that has already indicated the jurisdictions authorized to request advisory opinions from the European Court: the High Court of Cassation and Justice, the Constitutional Court, as well as the Courts of Appeal. On the possibility that Constitutional Courts will be likely included, see Oreste Pollicino, *La Corte costituzionale è una “alta giurisdizione nazionale” ai fini della richiesta di parere della Corte EDU ex Protocollo 16?*, 2 DIRITTO DELL’UNIONE EUROPEA 293–315 (2014).

on this point Sections C and D) and, on the other hand, it may suddenly become a new “battleground” for competition between different types of courts, fulfilling competing aims, including, in particular, apex ordinary and Constitutional Courts (see Section C.II). The effect, if judges do not show a cooperative attitude, would be one of complicating an already complex architecture. Within this puzzle, moreover, another piece must also be taken into account. This is that, in CoE countries which are also members of the EU, all the aforementioned courts have also to “compete” with the CJEU, as Section C will show.

### **C. The Mechanism of the Advisory Opinions of the ECtHR from the Viewpoint of Constitutional Courts: What Can the Experience of the Preliminary Reference Before the CJEU Tell Us?**

At first glance, the procedure devised in Protocol No. 16 appears to generally resemble the preliminary reference procedure before the CJEU (Article 267 TFEU), whilst departing from it in some regards.<sup>53</sup> However, to what extent are these two mechanisms comparable from the viewpoint of Constitutional Courts in EU Member States? In this Section, it is argued that the effects and impact of these proceedings on Constitutional Courts are largely dependent on the actual use made by these courts and the ECtHR of Protocol no. 16, and may well result in Constitutional Courts being further sidelined in the European legal order. Moreover, should Protocol No. 16 enter into force, the triangular relationships between Constitutional Courts, the CJEU, and the ECtHR may become even more unpredictable in their development and more complex for applicants seeking restoration of their rights.

#### *1. The Overall Aim of the Two Mechanisms and the Impact on Constitutional Courts*

The aims of the advisory opinion procedure within the ECHR and the preliminary reference procedure in the EU are apparently very different because of the different *telos* of each international/supranational organization. While the former is primarily designed to create a dialogue between national highest jurisdictions and the ECtHR while the national proceeding is still underway, so as to guide national judges in interpreting and applying the ECHR,<sup>54</sup> the EU preliminary reference procedure was conceived and used by the CJEU in order to foster the unity and uniformity of EU law across the Member States.<sup>55</sup> These

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<sup>53</sup> See Janneke Gerards, *Advisory opinions, preliminary rulings and the new Protocol No. 16 to the European Convention on Human Rights*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 630-651(2014).

<sup>54</sup> The relationship between national courts and the ECtHR is not a new topic (see Laurence R. Helfer, *Redesigning the European Court of Human Rights. Embeddedness as a deep structural principle of the European human rights regime*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125–29 (2008); A EUROPE OF RIGHTS (Helen Keller & Alec Stone Sweet eds., 2008) 687–688, *supra* at note 22, although it will be reshaped and will become more formalized as a result of Protocol No. 16.

<sup>55</sup> Compare ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 97 (2006). On the different scope and reach of the EU and the ECHR and on the different role played by the two supranational courts, see MARTINICO & POLLICINO, *supra* note 23.

different objectives reflect the differing natures of the two organizations: whilst the CoE is a human rights organization, which is in principle unwilling to set out a harmonized human rights policy for its forty-seven Contracting Parties,<sup>56</sup> the EU is primarily a regional integration process, with the CJEU acting as the first engine of the harmonization of national legal systems. Indeed, the CJEU was considered to be first and foremost a guarantor of EU competences, starting with the internal market, and a guarantor also of the separation of powers within the EU, rather than a human rights protector.<sup>57</sup>

In practice, however, given the principle of primacy (which has superseded even national constitutional norms) and the increasing case law on fundamental rights, both pre- and post-Charter, the two supranational courts are potentially able to encroach upon one of the most important functions that European Constitutional Courts have, that is, the protection of fundamental rights entrenched in national Constitutions.

Moreover, both the advisory opinion mechanism and the preliminary reference mechanism are unidirectional. Only national courts and, in the case of Protocol no. 16, only the highest courts identified by each Contracting Party, can refer questions to the two supranational courts, and not the other way around. This is notwithstanding that the potential for intrusion into national constitutional systems by the supranational courts could have made the introduction of a two-way communication flow between the ECtHR/CJEU and Constitutional Courts desirable as a step before the supranational court takes a decision which is sensitive for the domestic Constitution. In this light, the question arises of whether, based on the actual functioning of the preliminary reference procedure before the CJEU, it is possible to predict that Constitutional Courts might appear reluctant in exploiting the new device introduced by Protocol No. 16.<sup>58</sup>

The different conceptions which underlie the two organizations and, hence, the two judicial procedures, are reflected in the fact that while all Member States' courts are involved in the enforcement of Article 267 TFEU (with the well-known differences between courts of first instance and appeal and courts of last resort), the mechanism of the advisory opinions can be subject to a selective application, since adherence to Protocol no. 16 is voluntary on the part of the CoE's members (Section B). Thus, the standardization of the

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<sup>56</sup> This is confirmed by the long-standing margin of appreciation doctrine, now entrenched in Protocol no. 15. See Federico Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, 15 ICOURTS WORKING PAPER SERIES 2015, forthcoming in *A FUTURE FOR THE MARGIN OF APPRECIATION?* (Mads Andenas, Eirik Bjorge & Giuseppe Bianco eds., 2015).

<sup>57</sup> Although a recent study has proven that at the very beginning of the process of European integration there was an (unsuccessful) attempt to make the European Community a truly human rights actor, particularly in order to preserve fundamental rights in the Member States. See Grainne de Búrca, *The Road Not Taken: The European Union as a Global Human Right Actor*, 4 AM. J. INT'L L. 653–64 (2011).

<sup>58</sup> See, for more details, Section C.V.

relationship between every single national highest court and the ECtHR, for the sake of the uniform application of the ECHR, is not at stake in the case of the advisory opinion procedure.

In turn, according to the discretion granted to each Contracting Party, the new mechanism of Protocol No. 16 is likely to involve Constitutional Courts in a very asymmetrical way, depending on whether national governments have opted in or not. Given the limited number of signatures to the Protocol collected since the date of opening almost two years ago, and that only five countries, at present, have completed the ratification process (Section B), it may well be that only 10 Constitutional Courts—ten being the minimum requirement for the Protocol to enter into force—will “take advantage” of the advisory opinion procedure. Thus, for most Constitutional Courts, the legal situation might not change. Furthermore, even if Protocol no. 16 is ratified by all Contracting Parties of the ECHR, Constitutional Courts would still enjoy full discretion in deciding whether to request advisory opinions from the ECtHR. Indeed, the implementation of the mechanism is completely reliant on the unilateral commitment of Constitutional Courts (and other indicated highest courts) to engage in a dialogue with the ECtHR. This unilateral commitment cannot be taken for granted at the moment of the signature in the light of the foreseen effects of this new device (see also Section E) and, at the same time, of the willingness of the ECtHR to respond to these request.

By contrast, in the EU, when the conditions of Article 267 TFEU are fulfilled, the Constitutional Courts of all Member States are obliged to issue a preliminary reference to the CJEU, although many of them have traditionally avoided doing so.<sup>59</sup> Constitutional Courts under Protocol no. 16 would not have such an obligation.

## *II. Judges Entitled to Ask for an Advisory Opinion and to Refer: Are the Constitutional Courts Like Any Other Courts?*

Neither the preliminary reference procedure nor the advisory opinion mechanism set out a special role for constitutional judges.<sup>60</sup> They stand as any other judge entitled to use that device and do not enjoy a *sui generis* treatment despite their access and jurisdiction, their procedure of appointment and composition, and the constitutional nature of the “material” they constantly manage—material which involves potential conflicts between

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<sup>59</sup> On the reluctance of Constitutional Courts and its gradual overcoming, especially in the last few years, see Monica Claes, *Luxembourg, here we come? Constitutional Courts and the preliminary reference procedure*, in this Special Issue. On the still hesitant attitude of some constitutional judges, in particular in Eastern Europe, see the articles of this Special Issue highlighting a missing link between Constitutional Courts and the CJEU.

<sup>60</sup> See also Section B.IV *supra* on this point. In the EU, the lack of engagement of the CJEU with Constitutional Courts as the referring courts has been often criticized by scholars and has been put forward as justification, in turn, of most Constitutional Courts’ timid attitude toward the preliminary reference proceeding. See, e.g., Leonard F. M. Besselink, *The parameters of constitutional conflict after Melloni*, 39 EUR. L. REV. 531–52 (2014).

the level of protection of fundamental rights under constitutional law and that ensured under the two supranational regimes. While Constitutional Courts, in the countries in which they operate, are usually considered, because of their powers, to be “special courts”, their specialty is devalued or simply overlooked by the EU treaties and the ECHR (and its protocols).

However, while Article 267 TFEU treats all national judges equally in terms of access to the preliminary reference procedure before the CJEU, with the only difference lying in the obligation to refer for the courts of last resort (Constitutional Courts included), Protocol no. 16 draws a clear line between highest courts and tribunals and other courts. Only the former are entitled to request advisory opinions from the ECtHR, provided that a case is pending before them and that the relevant legal and factual background of the case is set forth; the remaining courts are not. Nonetheless, as stated *supra* (Section B.IV), what a highest court or tribunal actually is rests wholly upon the discretion of each Contracting Party.<sup>61</sup>

What is important to highlight here is the lack of any particular acknowledgment in Protocol no. 16 of the role of Constitutional Courts and judicial bodies that carry out the constitutional review of legislation as being one of the ultimate guarantors of constitutional rights at the domestic level in most Contracting Parties.<sup>62</sup> It is the importance and the potential clash between performing the constitutional review of legislation and applying the ECHR that is neglected in Protocol no. 16. By speaking of highest tribunals, Protocol no. 16 only takes into account the function of judges of last resort in criminal, civil, and administrative matters, regardless of whether they can also review the constitutionality of the norm applicable to the case. The prospect of conflict between the effects of the review of constitutionality and conventionality is denied by the Protocol. For it to have been otherwise, the Protocol would have needed to have referred specifically to these kinds of review instead of identifying the relevant courts through their ranking in the judicial order.

The problem does not arise where there is a diffuse system of constitutional review of legislation in place, because the ultimate judicial authority, for instance a Supreme Court, is the court of last resort for both the review of constitutionality and conventionality at the same time. Neither does it arise where a Constitutional Court, like in Germany, or, albeit with some caveats, in Italy, reviews the compliance of legislation with both the Basic Law and the ECHR. However, more complex and peculiar are the situations in which the control

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<sup>61</sup> Art. 10, Protocol No. 16. On this point, see Paul Gragl, *(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol no. 16*, 2 EUR. L. REV. 229–47 (2013).

<sup>62</sup> Possibly with the only exceptions of countries like the UK and the Netherlands where no constitutional review of legislation is in place.

of conventionality is disjointed from that of constitutionality, as in France. In these circumstances, which courts should stand as the “highest courts” under Protocol no. 16: those having ultimate jurisdiction only for the conventionality review, thus excluding the Constitutional Court, or also those performing the constitutionality review (although they are not involved in checking the compliance of national law with the ECHR)? In other words, by reference to which function are the “highest courts” to be identified?

Even in the case of centralization of the review of constitutionality and conventionality in the hands of the same Constitutional Court, some problems could arise if other courts are considered by the Contracting Parties to be “highest tribunals” for the purpose of Protocol no. 16. Indeed, it is clear that the most sensitive context is the one in which the outcome of the control of conventionality and constitutionality may diverge. In this regard, Protocol no. 16 can create problems for intra-judicial relationships at a state level, especially between Supreme Courts and Constitutional Courts if both are considered “highest tribunals”. A Supreme Court might strategically use the advisory opinion procedure in order to seek guidance in the interpretation of the ECHR by the ECtHR and to narrow through this ‘external’ interpretation the discretion of the Constitutional Court in protecting a fundamental right.

A comparable case has already arisen in the context of the EU with the French Court of Cassation deciding to make a preliminary reference to the CJEU before involving the *Conseil constitutionnel* through the *control prioritaire de constitutionnalité*.<sup>63</sup> Under those circumstances, the CJEU confirmed that the preliminary reference takes precedence over the domestic reference, with a view to ensuring the uniform implementation of EU law as the supreme value.<sup>64</sup> This could be explained by the mandate of the CJEU as the supranational court that fosters the ultimate objective of “an ever closer union” (Article 1 TEU). By contrast, in the case of the advisory opinion procedure in the framework of Protocol No. 16, and given the rationale of the procedure, which does not aim at ensuring the uniform implementation of the ECHR as long as fundamental rights are protected, it should be for any Contracting Party to determine whether precedence should be given to constitutional review of legislation and thus to a preliminary reference of constitutionality by the Constitutional Court or, rather, to requesting an advisory opinion on the interpretation of the ECHR.

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<sup>63</sup> See, e.g., Joined Cases C-188 & C-189/10, *Melki and Adbeli*, 2010 E.C.R. I-05667 and the comment by Arthur Dyeve, *The Melki Way: The Melki Case and Everything you Always Wanted to Know about French Judicial Politics (But Were Afraid to Ask)*, in *CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES* 309–22 (M. Claes et al. eds., 2012).

<sup>64</sup> See François-Xavier Millet & Nicoletta Perlo, *The first preliminary reference of the French Constitutional Court to the CJEU: révolution de palais or revolution in French constitutional law?*, in this *Special Issue*.

As a result, the position of constitutional judges in general can be challenged by the use of the advisory opinion procedure, like the preliminary reference procedure. Furthermore, the actual measures of implementation of Protocol No. 16 at the domestic level, depending on what are the “highest tribunals” identified, can transform a cooperative tool between the ECtHR and Constitutional Courts into a prospective limitation for the role of the latter courts.

### *III. The Prospective Impact of the ECtHR's Docket Control on Advisory Opinions*

Protocol No. 16 can be better understood within the framework of a wider process of reform of the ECHR system, which finds its justification in the need to counterbalance the increasing workload of the ECtHR and the delay of its judgments.<sup>65</sup> By allowing the highest courts and tribunals to seek guidance on the correct interpretation or application of the ECHR in advance, it is thought that Protocol no. 16 could reduce the number of applications brought before the ECtHR.<sup>66</sup> However, this objective could not be reached if the number of requests for advisory opinions overwhelmed the activity of the Court, which has to deal with almost 65,000 pending cases as of 31 March 2015.<sup>67</sup>

Hence the idea of, firstly, limiting the requests for advisory opinions to the highest jurisdictions and, secondly, granting the ECtHR the possibility of not, with due reasons, delivering the requested opinion. The very high number of preliminary reference proceedings before the CJEU, indeed, derives mainly from the activism of the courts of first instance and appeal that allow the CJEU to have a say on many crucial issues for the deepening of the European integration process (direct effect, primacy, state liability, and so on).<sup>68</sup> By contrast, as stated, supreme and, even more so, Constitutional, Courts, have

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<sup>65</sup> See Vladimiro Zagrebelsky, *Parere consultivo della Corte europea dei diritti umani: vera e falsa sussidiarietà*, in LA RICHIESTA DI PARERI CONSULTIVI ALLA CORTE DI STRASBURGO DA PARTE DELLE PIÙ ALTE GIURISDIZIONI NAZIONALI. PRIME RIFLESSIONI IN VISTA DELLA RATIFICA DEL PROTOCOLLO 16 ALLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO 91 (Elisabetta Lamarque ed., 2015).

<sup>66</sup> The issue of whether such an objective can actually be achieved cannot be discussed here, but it suffices to say that most applications reaching the courts are due to systematic violations of the Convention and come from 4 contracting parties: Ukraine, Russia, Turkey, and Italy. The advisory opinions under Protocol no. 16 do not appear to redress such systematic violations, which are patent and well known by the competent domestic authorities, and, thus, to eliminate the cause of the high number of applications from those States. Moreover, nothing prevents an individual from lodging an application before the ECtHR (Art. 34 ECHR), even if the matter has been already addressed by the Court under the advisory opinion procedure. See Explanatory Report to Protocol no. 16, Art. 5; Gerards, *supra* note 53, at 636.

<sup>67</sup> See the statistics available on the website of the Court at [http://www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2015\\_BIL.pdf](http://www.echr.coe.int/Documents/Stats_pending_month_2015_BIL.pdf).

<sup>68</sup> See Harm Schepel & Erhard Blankenburg, *Mobilizing the European Court of Justice*, in THE EUROPEAN COURT OF JUSTICE 37 (Grainne de Búrca & Joseph H.H. Weiler eds., 2001); Thomas de la Mare & Catherine Donnelly, *Preliminary rulings and EU legal integration: evolution and stasis*, in THE EVOLUTION OF EU LAW 363 (Paul Craig & Grainne de Búrca eds., 2011).

traditionally been more reluctant. By excluding lower courts, Protocol no. 16 avoids the “explosion” of requests for advisory opinions sent to the ECtHR,<sup>69</sup> but, at the same time, limits the timing of the ECtHR’s intervention to the very end of the domestic judicial proceeding. Earlier ECtHR involvement would possibly have been more effective in terms of restoring violated rights.

Moreover, unlike in the EU preliminary reference procedure, under Protocol No. 16 the ECtHR retains the power to decide which requests it wants to address; it is not a matter of admissibility of the reference on procedural and factual grounds.<sup>70</sup> Rather, the ECtHR enjoys a discretion as to which opinions to issue.

The request lodged by a highest court is analyzed by a panel of five ECtHR judges, including *ex officio* the judge of the High Contracting Party from where the mechanism was activated and, if the request is accepted, then it is the Grand Chamber that delivers the opinion. If the request is denied, reasons must be given for the refusal by the panel and must, moreover, be made public.

Given the vague phrasing of Article 2 of Protocol No. 16, it is likely that the ECtHR will develop its own criteria to select cases. It has also been convincingly argued that because of the composition of the panels selecting the advisory opinions and deciding on referrals to the Grand Chamber, the same conditions will apply to both cases. This would mean that the request of a highest court would be accepted “if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance” (Article 43(2) ECHR).<sup>71</sup> Thus, selection would be oriented by the quality and significance of the issues to be addressed.

There are elements which lead one to foresee a mild scrutiny on those conditions, whereas others lead to the consideration that the ECtHR will set strict standards. On the one hand, if the primary objective of the advisory opinion mechanism is to strengthen the relationships between national courts and the ECtHR and to favor the correct interpretation and application of the ECHR, it would be reasonable to assume that the ECtHR would try to be as responsive as possible to the concerns of the highest courts, selecting the greatest number of opinions compatible with the sustainability of its workload. The new mechanism of Protocol No. 16, indeed, is designed to centralize

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<sup>69</sup> Kanstantsin Dzehtsiarou, *Interaction between the European Court of Human Rights and member states: European consensus, advisory opinions and the question of legitimacy*, in THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS. TURNING CRITICISM INTO STRENGTH 116–46 (Spyridon Flogaitis *et al.* eds., 2013).

<sup>70</sup> See the *acte clair* doctrine of the CJEU and the *CILFIT* case, Case C–283/81, Srl CILFIT e Lanificio di Gavardo SpA v. Ministero della sanità, 1982 E.C.R. 03415.

<sup>71</sup> See Gerards, *supra* note 53, at 644–45.



interpretation of the ECHR, with a central authority, the ECtHR, giving guidance to the “fellow courts”.<sup>72</sup>

This trend towards the centralization of interpretation is testified by the preliminary reference procedure and the CJEU, although devoid of a docket control. The CJEU has traditionally been very generous in declaring preliminary references admissible, starting from the definition of “any court or tribunal of a Member State” allowed to issue a preliminary reference (Article 267 TFEU). The limits posed to preliminary references through the CJEU case law, like the *CILFIT* case and the *acte clair* doctrine, are aimed only at balancing the need for a constant dialogue between national and supranational courts with a workload that could hinder the CJEU.

On the other hand, however, the ECtHR fulfills a different role to the CJEU, and indeed, when the discussion on Protocol no. 16 was still underway, the ECtHR judges expressed serious concerns about the idea of delivering advisory opinions also.<sup>73</sup> The ECtHR usually judges *in concreto*, on specific cases, and when deciding on a case it does not see interpretation as separate from application of the ECHR.<sup>74</sup> This makes the mechanism of Protocol No. 16 rather different from the EU preliminary ruling procedure.<sup>75</sup> It is thus unlikely that the ECtHR will decide to issue an opinion on a law *in abstracto*; at the same time, it will not deliver an advisory opinion on issues which are already at stake in a pending case (Article 47(2) ECHR), unless the case is completely new and the Court has never been asked to decide on the point in question before.

#### *IV. The Effects of the ECtHR Opinions and the CJEU Preliminary Judgments: A Similar “Threat” to the Autonomy of Constitutional Interpretation?*

In theory, the most apparent difference between the preliminary reference procedure and the advisory opinion mechanism consists in the effects of the intervention of the supranational court.<sup>76</sup> By case law and conventional interpretation of the EU treaties,

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<sup>72</sup> Whether this centralization will succeed is difficult to predict, but some hypotheses are advanced in Section II.E.

<sup>73</sup> See Zagrebelsky, *supra* note 65, at 93.

<sup>74</sup> As noted by Vladimiro Zagrebelsky, Protocol No. 16, Art. 1, unexpectedly talks about “interpretation *or* application” rather than interpretation *and* application.

<sup>75</sup> See Christos Giannopoulos, *Considerations on Protocol N°16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?*, 2 GERMAN L.J. 337, 345 (2015).

<sup>76</sup> See Roberto Conti, *La richiesta di parere consultivo alla Corte europea da parte delle Alte Corti introdotto dal Prot. 16 CEDU e il rinvio pregiudiziale alla Corte di Giustizia dell'Unione europea. Prove d'orchestra per una nomofilachia europea*, in LA RICHIESTA DI PARERI CONSULTIVI ALLA CORTE DI STRASBURGO DA PARTE DELLE PIÙ ALTE GIURISDIZIONI NAZIONALI, *supra* note 63, at 100–02; Giannopoulos, *supra* note 73, at 341–43.

which are silent on this point, these effects are binding and *erga omnes* for the CJEU case law,<sup>77</sup> whilst, according to Article 5 of Protocol No. 16, the advisory opinions are explicitly non-binding. It would follow that the national judicial authority issuing the request for an advisory opinion then has discretionary powers regarding the implementation of the ECtHR opinion, meaning that it could perhaps even be disregarded (Section B.III.1).

This notwithstanding, the Explanatory Report to the new Protocol states:

They [*the advisory opinions*] would, however, form part of the case law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.<sup>78</sup>

Although the binding and *inter-partes* effects of final ECtHR judgments cannot be recognized in the new advisory opinions (Article 46(1) ECHR), the Explanatory Report emphasizes the importance of these opinions as part of the case law of the Court and, therefore, as being of comparable interpretative value to its judgments and decisions. Having force of *res interpretata*, the advisory opinions complement the ECHR and are thus expected to be complied with by national courts, parliaments, and administrations (and not only by the issuing authority).<sup>79</sup> The practical implications of these opinions, based on the Explanatory Report, could therefore be much more significant than the plain words of Article 5 let predict.

Whilst the reference in an advisory opinion to the interpretation of an ECHR right would, therefore, be binding, the concrete application and adaptation of that interpretation to the pending case would be for the national court to do. Thus, an advisory opinion would contain both a binding part and a part specifically addressed to the case at stake, and this latter would be merely a guide for the national judge. However, because of the link, highlighted in Article 1 of Protocol No. 16, between the advisory opinion and the pending

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<sup>77</sup> See Jan Komárek, *Federal elements in the Community judicial system: building coherence in the Community legal order*, 42 COMMON MKT. L. REV. 9, 10 (2005).

<sup>78</sup> See Explanatory Report at point 27.

<sup>79</sup> See Adam Bodnar, *Res interpretata: legal effect of the European Court of Human Rights judgments for other states than those which were party to the proceedings*, in HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21<sup>ST</sup> CENTURY, 223–62 (Yves Haeck & Eva Brems eds., 2014); Janneke Gerards, *The European Court of Human Rights and the national courts—giving shape to the notion of “shared responsibility”*, in IMPLEMENTATION OF THE ECHR AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE LAW. A COMPARATIVE ANALYSIS 21–27 (Janneke Gerards & Joseph W.A. Fleuren eds., 2014).

case, a clear-cut distinction between the general interpretation of an ECHR provision and its application to the case in the light of the criteria and standards set out by the ECtHR is very difficult to trace in practice. This, coupled with the authority of the opinion and the seriousness of the questions raised (see *supra* Section II.C), would make it almost impossible for the highest court requesting the advisory opinion not to follow it in resolving the case. Furthermore, given the general interpretative standards and principles established through them, advisory opinions could be deemed to have an impact comparable to an ECtHR pilot judgment, with *erga omnes* effects, rather than to an “ordinary” ECtHR judgment, with just *inter-partes* implications.

In practice, then, the difference between the preliminary reference procedure and the advisory opinion mechanism in terms of actual effects on domestic courts and national legal systems may dissolve.<sup>80</sup> Depending on the level of detail of the advisory opinions and on the potential use of the mechanism as a vehicle to anticipate subsequent case law development, advisory opinions, even if addressed to other highest courts, may be perceived by national Constitutional Courts as being a possible threat to their autonomy in constitutional interpretation. The same applied for many years—and still applies, today—with regards to preliminary rulings by the CJEU. Some commentators have considered, however, that advisory opinions might be rather vague in their content, because the ECtHR usually refrains from setting general principles, so as to reserve for itself a certain margin of manoeuvre for addressing subsequent cases.<sup>81</sup> By the same token, the Court might not be willing to use the possibility, expressly provided for by Protocol No. 16, to deliver separate opinions where no unanimous consent is reached, as has happened in the two cases of advisory opinions delivered to the Committee of Ministers. Should this be confirmed, the preference for delivering a single opinion would be likely to lead to a compromise solution among ECtHR judges, open to different interpretations.<sup>82</sup>

*V. Would Constitutional Courts be Willing to Engage in the Advisory Opinion Procedure?  
Drawing on the Experience of the Preliminary Reference Procedure in the EU*

What will make the advisory opinion procedure work is first of all a cooperative attitude by the parties involved: the ECtHR and national highest courts, and in particular the Constitutional Courts as the traditional watchdogs of fundamental rights in domestic constitutional systems in Europe. The centralizing trend in the interpretation of the ECHR

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<sup>80</sup> It has also been argued, on the EU side, that the level of follow-up on the CJEU preliminary rulings by national courts has been rather modest: see, for example, Michal Bobek, *Of feasibility and silent elephants: the legitimacy of the Court of Justice through the eyes of national courts*, in JUDGING EUROPE’S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED 917–33 (Maurice Adams *et al.* eds., 2013).

<sup>81</sup> Zagrebelsky, *supra* note 65, at 96.

<sup>82</sup> *Id.* at 95.

and its protocols that may be detected as a consequence of the entry into force of Protocol no. 16 can only become a reality if and insofar as national courts activate the mechanism.

However, as has been widely acknowledged, the experience of the preliminary references before the CJEU testifies that Constitutional Courts in particular have not usually been willing to engage in such a “conversation.” This is despite the fact that, acting as courts of last resort, Constitutional Courts are obliged to refer questions of validity and interpretation of EU law that arise before them in order to solve a pending case. If these Courts have been reluctant in the presence of a precise obligation stemming from Article 267 TFEU, the hesitancy may be even stronger where, as in the case of the advisory opinion mechanism, such a duty does not exist.

Yet a direct “confrontation” between the ECtHR and Constitutional Courts is unavoidable as long as the object and the standard of review of conventionality and constitutionality at least partially overlap, or as long as they have to cope with the same challenges. This is reflected also in the shifting attitude of many Constitutional Courts towards the preliminary reference procedure in the EU in the aftermath of the Lisbon Treaty and the Euro-crisis. The codification of rights at EU level and eventually the entry into force of the Charter of Fundamental Rights has triggered a reaction by some reluctant Constitutional Courts (in Italy, France, and Spain, for example) that could no longer escape direct interaction with the CJEU, once that Court had officially become a competing authority for the determination of the level of protection of rights ensured at the domestic level (through the application of EU law). By the same token, a similar reaction by Constitutional Courts (in Germany and Slovenia, for instance) was triggered within national constitutional systems facing the stress of the financial crisis and the Euro-crisis law.

Likewise, in the implementation of the new advisory opinion procedure, Constitutional Courts can potentially be interested in establishing a long-standing “partnership” with the ECtHR, with the aim of ensuring the stability and predictability of the system of fundamental rights protection in Europe. The process of building up a relationship between Constitutional Courts and the ECtHR is the opposite of the one developed between Constitutional Courts and CJEU, although the final outcome, following Protocol No. 16, could be similar.

Within the framework of the ECHR, the national and supranational courts have always focused on the same issues in terms of the protection of rights, but they did not encroach upon each other’s competence until individual applications to the ECtHR were made possible in 1998. After Protocol No. 11 to the ECHR eventually entered into force, only a hidden dialogue between Constitutional Courts and the ECtHR was possible, as no device for their direct interaction was in force. Protocol No. 16 and the advisory opinions would fill this gap. By contrast, in the EU, the mechanism by which Constitutional Courts and the CJEU can interact directly—the preliminary reference procedure—has been in force since the very beginning of the process of European integration. However, until the 1970s, when

the CJEU became increasingly involved in the protection of fundamental rights, the supranational court and Constitutional Courts spoke different languages. This remains partly the case even today: the CJEU has usually spoken the language of the internal market, whereas Constitutional Courts have always been concerned with constitutional rights beyond economic freedoms.

Even without using the preliminary reference procedure, the CJEU and Constitutional Courts have been indirectly engaged in an intense conversation through their case law, which has shaped the whole process of European integration. What held most Constitutional Courts back from exploiting the preliminary reference tool until recently, despite the legal obligation arising from the treaties and the *erga omnes* effects, was the constraint provoked upon them by a direct and targeted preliminary ruling of the CJEU adopted upon their request.

For the same reason, Constitutional Courts could also feel uncomfortable with the advisory opinion mechanism, which, as has been argued, if activated would be more binding in terms of ECHR interpretation than one could expect, based on Article 5 of Protocol No. 16. Since, by contrast with the prescription of Article 267 TFEU, the request of advisory opinions is optional, in order to preserve its autonomy a Constitutional Court might be reluctant about submitting its case law on fundamental rights to the standards set by the ECtHR for the pending case. Constitutional Courts might strategically avoid requesting advisory opinions if they perceive those opinions as being not merely guidance, but as limiting their discretion to find the most suitable solution for the domestic jurisdiction.

*VI. National Constitutional Courts and the EU Accession to the ECHR: "Lost in the Application" of Protocol No. 16 and the EU Preliminary Reference Procedure*

To the complex picture of the relationship between the ECtHR and Constitutional Courts already laid out must be added a further element. How can the European system of fundamental rights litigation and the place of Constitutional Courts accommodate the new mechanism of the advisory opinions within the preliminary reference procedure?

This question is not merely hypothetical; it has been expressly invoked by the CJEU as a prospective issue of incompatibility between the draft accession agreement of the EU to the ECHR and EU law.<sup>83</sup> When Protocol No. 16 was signed, on 2 October 2013, the draft agreement had already been finalized. Yet the CJEU detected a potential threat arising from the advisory opinion procedure for the autonomy of EU law,<sup>84</sup> in particular for what

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<sup>83</sup> See Opinion 2/13, paras. 197-199 (Dec. 18, 2014), <http://curia.europa.eu/>.

<sup>84</sup> See, e.g., Daniel Halberstam, *It's the Autonomy, Stupid!* A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, 16 GERMAN L. J. 10546 (2015); Johan Callewaert, *Protocol 16 and the Autonomy of EU Law: Who Is Threatening Whom?*, EUROPEAN LAW BLOG, 3 October 2014, available at <http://europeanlawblog.eu/?p=2551>.

has been described as “the keystone of the judicial system established by the Treaties” (§ 176 Opinion): the preliminary reference procedure.<sup>85</sup> It is especially the lack of coordination between these two mechanisms when Constitutions, the Charter, and the ECHR overlap on the protection of a certain right that creates concerns in the Opinion of the CJEU. The CJEU focused its reasoning here only on the CJEU and the ECtHR, as if Constitutional Courts or national judges carrying out constitutional review of legislation were not at stake in this “dangerous twist” for the protection of fundamental rights in Europe.

The CJEU argued that the main mechanism which has protected the autonomy of EU law—the preliminary reference procedure—would be jeopardized if the same judges (i.e., the national highest courts and tribunals, which under EU law are obliged to issue a preliminary reference whenever a question of interpretation or validity is raised) firstly involved the ECtHR through a request for an advisory opinion. This would occur, in particular, when a highest domestic court had doubts about the compliance of EU norms or national measures implementing EU law with the ECHR. The risk, in the Opinion of the CJEU, is the circumvention of the Article 267 TFEU procedure.

According to the CJEU, when the protection of a right equally concerns the EU Charter and the ECHR, national courts of last instance might find it more convenient to resort to the advisory opinion procedure in combination with the activation by the ECtHR of a mechanism that is devised by the draft accession agreement—the “prior involvement” of the CJEU itself by the ECtHR. This could happen when an indirect action against EU law for the violation of an ECHR right is brought before a national court of last resort, which might then decide not to issue a preliminary reference to the CJEU, but rather a request for an advisory opinion from the ECtHR. EU law would then be interpreted without the CJEU. The prior involvement mechanism allows the ECtHR only to consult the CJEU before a decision affecting EU law (and its autonomy) is taken.

In Opinion 2/13, the CJEU considered the combination of a request for an advisory opinion and the prior involvement mechanism to have the potential to structurally undermine the use of the (direct) preliminary reference procedure. In this case, the usual “blindness” of the supranational courts towards the peculiar and essential role of Constitutional Courts in Europe was also confirmed.<sup>86</sup> Indeed, on the one hand, the problem about the order of precedence among different types of referrals replicates the complex dynamic already in place between preliminary references of constitutionality to Constitutional Courts and preliminary references under EU law. On the other hand, in Opinion 2/13 the CJEU

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<sup>85</sup> Adam Lazowski & Ramses A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GERMAN L. J. 179, 188 (2015).

<sup>86</sup> With reference to Constitutional Courts in the EU, see Jan Komárek, *National constitutional courts in the European constitutional democracy*, 3 INT’L J. CONST. L. 525–44 (2014).

oversimplified the reality by raising the issue of the bilateral relationship between the ECtHR and itself when a right is protected to a different extent by the Charter and the ECHR. However, Constitutions are also competing sources of authority for the protection of fundamental rights and so are their Courts, which are inserted into a network of relationships starting from those with the respective domestic supreme courts. In a system of fundamental rights protection resulting from the process of EU accession to the ECHR and from Protocol No. 16, and designed through these intertwined—although not fully coordinated—national and supranational courts, the main aim for which this complex architecture is in place is often overlooked. In other words, in an attempt to codify the procedures and to claim the precedence of a preliminary referral (constitutional, European, or conventional) over the others, according to “top down” mechanisms, it is possible to lose sight of the protection of fundamental rights, with too many “Constitutional Courts,”<sup>87</sup> domestic, European, and conventional, pretending to be judge in their own cause and to have the last word.<sup>88</sup>

The standpoint of national Constitutional Courts in the application of these mechanisms cannot be neglected, as they represent the main point of mediation between the enforcement of EU law and the ECtHR with domestic Constitutions, especially when a direct conflict arises between the level of protection accorded to a fundamental right under national constitutional law *vis-à-vis* the ECHR and/or the EU Charter. Given their proximity to citizens, national Constitutional Courts are best placed to accommodate supranational norms and case law within their domestic jurisdictions, while preserving, at the same time, a suitable degree of national constitutional ownership.

#### **D. How to Fix the Problems Deriving From the Advisory Opinions in the ECHR System? Lessons from the Advisory Opinions Within the ICHR System**

##### *1. The Inter-American Court of Human Rights as a Model*

After two years, Protocol No. 16 has not yet entered into force. There has been much commentary and discussion in the legal scholarship on the functioning of the advisory opinion system within the ECHR, underlining the strengths but also the weaknesses, as clearly shown in the analysis provided in Sections B and C. In particular, one of the most criticized aspects is that apparently Protocol No. 16 would not be able to reach the goals for which it was designed, due to, on one side, the uncertainty surrounding the

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<sup>87</sup> On the ECtHR and the CJEU as “Constitutional Courts” in their respective domains, see Steven Greer & Luzius Wildhaber, *Revisiting the Debate about “Constitutionalising” the European Court of Human Rights*, 12 HUMAN RIGHTS L. REV. 655, 668–70 (2012); BARBARA RANDAZZO, GIUSTIZIA COSTITUZIONALE SOVRANAZIONALE. LA CORTE EUROPEA DEI DIRITTI DELL’UOMO 4–10 (2012); Bo Vesterdorf, *A constitutional court for the EU?*, 4 INT’L J. CONST. L. 607–17 (2006).

<sup>88</sup> Aida Torres Pérez, *Too many voices? The prior involvement of the Court of Justice of the European Union*, 4 EUR. J. HUMAN RIGHTS 565, 583 (2013).

harmonization of the advisory function with the contentious function (as demonstrated by the experience of the ICHR), and, on the other side, the real utility of the Protocol as an instrument capable of strengthening the judicial dialogue in Europe (see Section B).<sup>89</sup>

These critical aspects have also all appeared in the Inter-American system. The Inter-American Court of Human Rights (hereafter, the ICHR) has dealt with these issues in a very developed and advanced body of jurisprudence, and it is useful to look at this in order to speculate on the possible evolutions of the advisory mechanism in the European context.

With this question of anticipating how the advisory mechanism might function being the main purpose, we will firstly analyze the main structural characteristics of the advisory opinion within the ICHR (the relevant norms and the case law developed by the Court in the light of the elements of the ICHR system) (I), before focusing, secondly, on the relationship between its consultative function and its adjudicatory function (II), and, finally, on the dialogue between the ICHR and States (III).

## *II. The Structural Features of the Advisory Opinions in the ICHR*

In 1985, the Vice-President of the ICHR, Thomas Buergenthal, wrote, “[t]he role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction.”<sup>90</sup> Being an “autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights” (as established in Article 1 of its Statute), the ICHR exercises its jurisdictional function through two modalities: the adjudicatory function and the advisory function.

The ICHR advisory function, defined as “multilateral rather than litigious”,<sup>91</sup> has been enriched by the Court itself, taking as a starting point Article 64 of the American Convention.<sup>92</sup>

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<sup>89</sup> See Pasquale De Sena, *Caratteri e prospettive del Protocollo 16 nel prisma dell’esperienza del sistema interamericano di protezione dei diritti dell’uomo*, 8 DIRITTI UMANI E DIRITTO INTERNAZIONALE 593–606 (2014).

<sup>90</sup> See Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L L. 1 (1985).

<sup>91</sup> See I/A Court H.R., *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*, Advisory Opinion OC–15/97 of 14 November 1997. Series A, No.15, para. 26, according to which it is evident that the State or organ requesting an advisory opinion is not the only one with a legitimate interest in the outcome of the procedure, whose very purpose is the protection of human rights.

<sup>92</sup> The advisory function, besides complementing the ICHR adjudicatory competence, also complements the competences of the Inter-American Commission of Human Rights, as indicated in the Charter of the Organization of American States (Art. 106) and in the American Convention of Human Rights (from Arts. 34 to 51).



### 1. Subjects

According to this provision, all Member States of the Organization of American States (hereafter, the OAS), whether or not they have ratified the Convention, may consult the Court. All the organs of the Organization (organs listed in Chapter X of the OAS Charter) may also consult the Court, but their competence is limited because they can only consult the Court within their sphere of competence.<sup>93</sup> Even if the Inter-American Commission is one of the organs listed in Chapter X of the OAS Charter, the Court has recognized its absolute right to consult the Court, given the Commission's broad powers relating to the promotion and observance of human rights as established in Article 112 of the OAS Charter.<sup>94</sup> However, this absolute right does not extend the Commission competence to address a request to the Court according to Article 64(2) (see below).<sup>95</sup>

Organs indicated in Article 64 may also participate in the proceeding, despite the fact that neither the Statute of the ICHR<sup>96</sup> nor the 1980 Rule of the Court provide for *amicus curiae*. This is because since its very first advisory opinion the Court allowed national and

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<sup>93</sup> The expression "within their sphere of competence" has been interpreted by the Court with a "legitimate institutional interest" by the requesting organ in the questions posed in the request. See I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982. Series A, No. 2, para. 14, according to which, even if initially each organ decides whether the request falls within its sphere of competence, the Court has the ultimate word in determining compliance with this requisite by reference to the OAS Charter and the constitutive instrument and legal practice of the particular organ. See also BERTHA SANTOSCOY-NORO, *LE SYSTEME INTERAMERICAIN DE PROTECTION DES DROITS DE L'HOMME*, EN INSTITUT INTERNATIONAL DES DROITS DE L'HOMME (1996).

<sup>94</sup> See *The Effect of Reservations on the Entry into Force*, *supra* note 91, at para 16. See also I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of September 8, 1983. Series A, No. 3 OC 3/1983, para. 42.

<sup>95</sup> See I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A, no.14, paras. 24–26, in which the Court excluded the possibility for the Commission to request an advisory opinion on a proposed amendment to the Constitution of Peru, which would have expanded the number of cases for which the death penalty could have applied, because the Commission was not requesting a statement as to the compatibility of that provision of Peru's domestic law with the abovementioned provision of the Convention. On the contrary, the questions posed by the Commission made no reference to that provision, being general in nature and concerning the obligations and responsibilities of the states or individuals that promulgate or enforce a law manifestly in violation of the Convention.

<sup>96</sup> Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No. 448).

international organizations to take part in the procedure,<sup>97</sup> later extending this possibility also to individuals and non-organized groups.<sup>98</sup>

## 2. Object

According to the text of Article 64, two different types of advisory opinions are recognized, establishing in general a very wide competence (far wider than the advisory function provided by Protocol No. 16).

### *a) The Interpretation of the Convention and of Other International Treaties Concerning the Protection of Human Rights*

As a matter of fact, according to Article 64(1), the Court may be consulted regarding the interpretation not only of the American Convention, but also of other treaties concerning the protection of human rights in the American states. Whilst identification of the Convention is absolutely clear, the definition of the “other treaties concerning human rights” has been the subject of interpretation by the Court since its first advisory opinion.<sup>99</sup>

According to the ICHR, Article 64 confers “the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the Inter-American system”.<sup>100</sup> Thus, it is not necessary that the “treaty” has been adopted within the Inter-American system or that it is a “treaty” to which only American states are parties. The Convention does not distinguish between multilateral and bilateral treaties or between treaties whose main purpose is the protection of human rights and those treaties, which, though they may have some other principal object, contain provisions regarding human rights.<sup>101</sup>

Thus, in its advisory function the Court may interpret any treaty on the protection of human rights valid in any of the States of the OAS, even when they have not ratified the American Convention. It is not even important whether this treaty has been conceived

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<sup>97</sup> See I/A Court H.R., “Other treaties” subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 5.

<sup>98</sup> In the 2009 reform of the Rules of the Court, *amicus curiae* was expressly included for adjudicatory proceedings, while for advisory proceedings the Court may authorize any person to give its opinion on the consultation.

<sup>99</sup> The Court was asked by the Government of Peru to interpret the phrase “or of other treaties concerning the protection of human rights in the ‘American States.’” Cf. “Other Treaties,” *supra* note 95.

<sup>100</sup> *Id.* at para. 21.

<sup>101</sup> *Id.* at para. 21. See PEDRO NIKKEN, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI (2003); Buergenthal, *supra* note 90.

within the framework of the Inter-American system or whether it involves one or more non-American States.<sup>102</sup> Consequently, the Court has interpreted international treaties like the Convention on the Rights of the Child<sup>103</sup> and the 1963 Vienna Convention on Consular Relations.<sup>104</sup>

Moreover, in interpreting the word “treaty”, as indicated in Article 64, the Court has stated that it must include other documents too, even if these are non-binding and even if they have not been concluded following the formalities required for treaties. In this context, it has recognized the possibility of pronouncing an advisory opinion on the text of the 1948 American Declaration of the Rights and Duties of Man, based mainly on the idea that Member States of the OAS have agreed that the Declaration contains and defines the fundamental human rights referred to in the Charter of the Organization itself, which cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.<sup>105</sup>

Finally, the ICHR extended its advisory competence in interpreting the Convention or other treaties concerning the protection of human rights to reservations attached to those instruments, based on the idea that reservations are a part of the treaty itself.<sup>106</sup>

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<sup>102</sup> One of the objections posed to the extension of the limits of the Court's advisory jurisdiction is the possibility of conflicting interpretations between the Court and other organs outside the Inter-American system that might be called upon also to apply and interpret treaties concluded outside that system. Considering that this is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated, the Court considered that even a restrictive interpretation of Art. 64 would not avoid the possibility that this type of conflict might arise. See *Other Treaties*, *supra* note 95, at para. 50.

<sup>103</sup> See I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC–17/02 of August 28, 2002. Series A, No.17; I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC–21/14 of 19 August 2014.

<sup>104</sup> Even if at first glance the Vienna Convention on Consular Relations is not a treaty on human rights, it does contain important provisions on the right to information on consular notification (under Art. 36(1)(b)). The concurrent opinion of Judge Cançado Trindade is fundamental in recognizing that this Convention can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law. See I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC–16/99 of 1 October 1999. Series A no.16.

<sup>105</sup> See I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC–10/89 of 14 July 1989. Series A, no.10OC 10/1989, paras. 43 and 48.

<sup>106</sup> According to the Court, the effect of a reservation, as provided in the Vienna Convention, is to modify with regard to the State making it the provisions of the treaty to which the reservation refers. See *Restrictions to the Death Penalty*, *supra* note 94, at para. 45.

*b) The Interpretation of National Laws*

According to Article 64(2), Member States of the Organization can activate the advisory function of the Court by requesting opinions regarding the compatibility of any of their domestic laws with the international instruments mentioned in Article 64(1). All OAS Member States—and not only those party to the Convention—can consult the Court to determine whether provisions of their domestic laws conform to the obligations they assumed in the Convention or in other human rights treaties.

The Court has clarified that the expression “domestic law” includes legislative or constitutional drafts.<sup>107</sup> This is because the purpose of the ICHR advisory function is to assist OAS Member States and organs in complying with their international human rights obligations, and also to avoid the contentious legal process and all related sanctions. This purpose would be frustrated if the Court could emit a decision on State legislation only once the law entered into force. However, the Court can decide whether to admit or to reject advisory opinion requests regarding legislative proposals, and, in doing so, it has to bear in mind that its main purpose is to assist the requesting state in better complying with its international human rights obligations. As a matter of fact, the Court will reject a request in all those cases in which it would become embroiled in domestic political squabbles, which could affect the role assigned to it by the Convention.

*3. The Effects of the Decisions*

The extensive interpretation developed by the ICHR and the progressive extension of its material competence, as well as of the subjects legitimated to activate the procedure, are the consequences of the principal and unique purpose of the advisory function itself: the interpretation of the American Convention and of other treaties concerning the protection of human rights in the American States. The extensive advisory jurisdiction conferred on the Court by Article 64 of the Convention and by its judicial interpretation is unique in contemporary international law. The advisory opinion system has created a parallel system to the adjudicatory power of the Court by offering an alternative judicial method with consultative nature. Its aim is to assist states and organs in applying and complying with human rights treaties, without subjecting them to the formalism and the sanctions associated with the contentious judicial process.<sup>108</sup> These considerations are fundamental in order to clarify the framework as to the effects of advisory opinions. This is also important because, from the effects of decisions, some considerations can be drawn

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<sup>107</sup> See I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984. Series A, no. 4, on the request presented by the Government of Costa Rica of an advisory opinion on the compatibility of a constitutional reform of Articles 14 and 15 of its Constitution. See *id.* at para. 26.

<sup>108</sup> See *Restrictions to the Death Penalty*, *supra* note 93, at para. 43.

regarding the relationship between adjudicatory and advisory functions and regarding the judicial dialogue in the Inter-American context.

The foregoing considerations imply that, for the Court, advisory opinions do not have the same binding effect as adversarial decisions. However, they do have undeniable juridical effects, and consequently the requesting State or organ is not the only party interested in the result of the proceeding. For if a State carries out activities that the ICHR, through an advisory opinion, has determined as incompatible with the American Convention, that State can no longer claim to be unaware that its behavior is violating its obligations under the Convention.<sup>109</sup>

Considering the main philosophy behind the advisory function—"assisting the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field"<sup>110</sup>—the Court has a discretionary, but not arbitrary, power to comply with a request. It can refuse every time a request for an advisory opinion has another purpose that would weaken the system established by the Convention and that would distort the advisory jurisdiction of the Court in a manner that would impair the rights of potential victims of human rights violations.<sup>111</sup>

The legal scholarship dealing with the effects of advisory opinions is not unanimous. Part of it considers that the Court exercises the function, both at the adversarial and advisory levels, of applying and/or interpreting the American Convention, thereby functioning as a jurisdictional body and, as such, making jurisdictional decisions. According to this scholarship, these decisions should be considered as case law, and an auxiliary source of law in international law according to the provisions of Articles 38-59 of the Statute of the International Court of Justice. Indeed, this approach is supported by the fact that many advisory opinions have been invoked in contentious cases.<sup>112</sup>

Nonetheless, it is also true that Article 2 of the Court's Statute distinguishes between its jurisdictional function and its advisory function. However, part of the legal scholarship considers that in this case the term "jurisdiction" has been used as a synonym for "contentious."<sup>113</sup>

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<sup>109</sup> See JORGE ERNESTO ROA, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 96 (2015).

<sup>110</sup> See *Other Treaties*, *supra* note 95, at para. 25.

<sup>111</sup> *Id.* at para. 31.

<sup>112</sup> See NIKKEN, *supra* note 101.

<sup>113</sup> *Id.* at 171.

Meanwhile, another strand of legal scholarship,<sup>114</sup> which is based on the Court's expressions according to which in the exercise of its advisory function the Court fulfills a consultative function through opinions, considers that they "lack the same binding force that attaches to decisions in contentious cases."<sup>115</sup>

### *III. The Relationship Between the Advisory and the Adjudicatory Jurisdiction*

One of the most delicate aspects that demands the attention of scholars studying the possible problems of Protocol 16 is the relationship between the advisory and the adjudicatory function. It is necessary to seek a harmonization between the two functions. The following parts of the article set out some considerations as to how the ICHR has dealt with the issue.

#### *1. The Use of Advisory Opinions to Inform Decisions on Contentious Cases, as Interpretative Criteria*

In at least twenty adjudicatory cases, the Court has applied arguments taken from advisory opinions as part of the interpretative process in contentious cases. It remains unclear whether the Court does so because it feels bound/obliged to refer to its case law or whether it only does so on a discretionary basis. Under the first approach, the Court would define the effects of the advisory opinion throughout its interpretation. On one side, advisory opinions would be considered as binding on all states, thereby representing a horizontal precedent that could be used in contentious cases. On the other side, the Court would not consider its advisory opinions to be binding, except when "transposed" in a decision in an adjudicatory case. Under the latter approach, advisory opinions would only represent subsidiary interpretative criteria, with an opinion only being converted to international jurisprudence when the Court uses it as a basis for its decision in an adjudicatory case. This approach would be problematic, because from the point of view of States' international responsibility it would mean recognizing that in all those cases in which the Court based a decision in favor or against a State on an advisory opinion, it would be applying interpretative criteria that really are not binding on any State. Any declaration of State responsibility would stand outside the international obligations of the State itself, with the subsequent violation of the rights of victims.

If advisory opinions are considered to simply be part of the argumentative process developed by the Court, then they cannot be considered binding. The latter hypothesis appears to be the most consistent, but it is probably less tied to reality, because in fact the

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<sup>114</sup> See HÉCTOR FAÚNDEZ LEDEZMA, *EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES* 450–54 (1996).

<sup>115</sup> See *Other Treaties*, *supra* note 95, at para. 51.

Court usually directly quotes advisory opinions when adopting certain decisions in a proceeding.

### *2. The Use of Adjudicatory Jurisprudence in Advisory Opinions*

If the Court uses the precedents pronounced in contentious cases in advisory opinions as part of the decision, it would have the same consequences as we have already mentioned with reference to the effects of an advisory opinion. The most complicated situation is when the Court develops, in an advisory opinion, jurisprudence that has been established in a contentious case, which happened in the advisory opinion on “*Juridical Condition and Human Rights of the Child*.”<sup>116</sup> In this opinion, the Court not only defined the juridical status and children’s human rights in accordance with international standards, but referred to the case *Niños de la Calle (Villagrán Morales y otros) v. Guatemala*<sup>117</sup> to support the development of rights to equality, education, and judicial guarantees for children. The Court increased the standard of protection of their rights and imposed new obligations on States. It might be thought that in these cases in which the interpretative principle affirmed in an advisory opinion derives from the development of a binding precedent, that standard is not made mandatory.

In particular, the Court’s extension of its advisory jurisdiction does not imply that it is possible to a State that is not part of the Convention a standard that is nothing else but the development of an interpretation of an international treaty that is binding for the requesting State. It would be possible to apply this standard given the *pro persona* principle in human rights interpretation, but not for a direct application of the advisory opinion in which it was provided.<sup>118</sup>

### *3. The Case of States That Have Not Accepted the Court’s Jurisdiction*

In this context, we can consider two different options.

(1) The case in which the Court is asked to render an advisory opinion on a dispute that could not be referred to the Court under the adjudicatory function because one of the States had not accepted its contentious jurisdiction;

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<sup>116</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of 28 August 2002, Series A, no.17.

<sup>117</sup> I/A Court H.R., *Case of the “Street Children” (Villagrán Morales and others) v. Guatemala*, Decision of 19 November 1999, Series C No. 63.

<sup>118</sup> See ROA, *supra* note 109.

(2) The case in which the Commission, in the absence of a State's consent to the Court's jurisdiction, seeks an advisory opinion under Article 64(1), being unable to refer the case to the Court under the contentious jurisdiction.

As was mentioned above, the ICHR has recognized the absolute right of the Inter-American Commission to consult the Court. According to the powers and obligations conferred upon the Commission by the Convention, it is necessary and appropriate that it consult the Court regarding the meaning of certain provisions, whether or not there exists an interpretative difference between a State position and that of the Commission. The Court has considered that only cases in which the advisory opinion request might interfere with the proper functioning of the system of protection spelled out in the Convention, or if it might adversely affect the interests of the victim of human rights violations, would not be admitted.<sup>119</sup>

#### IV. The Dialogue

In the Inter-American context, the "dialogue" follows two main directions: judicial and intergovernmental.<sup>120</sup> As seen in the previous paragraphs, advisory opinions are generally not legally binding. However, legal scholarship, Member States, and the Court itself tend to recognize them at least at the interpretative level, and many judges have used advisory opinions as interpretative arguments.<sup>121</sup>

However, as will be indicated below, even if State behavior has not been unanimous, the "dialogue" with the States has been quite complicated, for several reasons. First, standards of protection elaborated in advisory opinions are not binding on Member States. This is

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<sup>119</sup> See *Other Treaties*, *supra* note 95. Another limit is represented by all those cases in which the advisory opinion of the Court could produce a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings. Such a result would distort the Convention system. Cf. I/A Court H.R., *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991. Series A, no.12, para. 28.

<sup>120</sup> It is necessary to underline that "judicial dialogue" within the Inter-American system has been better realized through conventionality control and consistent interpretation. See Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, 2 ESTUDIOS CONSTITUCIONALES 531-622 (2011).

<sup>121</sup> In this sense, for example, the Supreme Court of Argentina in the case *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.* case no. 17.768, decision of 14 June 2005, declared the unconstitutionality of two amnesty laws (Law no. 23.492 and Law no. 23.521). For several reasons, but with an explicit reference to the advisory opinion on *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, considered as part of the Convention case law. More specifically, this opinion underlined, with direct reference to the Convention, the general principle according to which all state organs have to comply with State international obligations. The supreme judge of Argentina invoked this principle in order to inhibit human rights violations committed during the military dictatorship. See De Sena, *supra* note 89; RoA, *supra* note 109, at 130 on the application of the ICHR advisory opinion in the Constitutional Court of Colombia case law.



due to legal conditions, but also to the extension and indeterminacy of the ICHR's competence. Member States cannot find in advisory opinions a general source of legal obligation, as in the case of contentious decisions, partly because the Court cannot pronounce on State responsibility.

Whilst it is true that American States, which are also part of the Convention system, have, in the great majority of cases, respected advisory opinions, human rights protection implies a higher and greater level of commitment.

It is important to underline that, in the latest advisory opinion, "*Rights and guarantees of children in the context of migration and/or in need of international protection*,"<sup>122</sup> the ICHR stated that the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, *it can provide guidance* when deciding matters relating to children in the context of migration and to avoid possible human rights violations. Similarly, the Court found it necessary to recall that, pursuant to international law, when a State is party to an international treaty, such as the American Convention on Human Rights, such a treaty is binding on all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercising its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the Inter-American human rights system, which is "the protection of the fundamental rights of the human being."<sup>123</sup>

Thus, advisory opinions are considered as a binding parameter for national authorities. From now on, ignoring an advisory interpretation and implementing or maintaining the validity of a law contrary to the interpretation set out in the advisory opinion, could generate the international responsibility of the State before the Inter-American Court.

Although progress in determining the effects of advisory opinions has been attained, there remains a contradiction between, on one side, the increasingly clear binding force of advisory opinions and, on the other side, the Court's attitude of continuing to differentiate, in this aspect, the effects of advisory opinions and the judgments in contentious cases.

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<sup>122</sup> See *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra* note 103.

<sup>123</sup> *Id.* at para. 31.

However, it is still difficult to explain the differences between the effects of an advisory opinion and those of a contentious decision, beyond the intrinsic characteristics of each of the procedures. Moreover, the Court has advanced a strange understanding of its advisory function, because the ICHR is not a higher court with the power to revoke lower court sentences, ignoring its own precedents, and it is not even possible to talk about the value of a precedent on a horizontal level.<sup>124</sup>

Finally, in exercising the advisory function, the Court can perform a compatibility control between norms in force (constitutional and legal) or legislative drafts (constitutional or legal) of States. The control of compatibility of existing rules of States with the American Convention is analogous to the abstract and posterior control of constitutionality and the control of compatibility of constitutional or legislative drafts is analogous to prior judicial review. However, caution is needed here because, as has been underlined, the analogy between the Inter-American Court and Constitutional Courts is limited since the Inter-American Court cannot invalidate provisions contrary to the Inter-American *corpus iuris*.<sup>125</sup>

#### E. Final Remarks

If Protocol No. 16 becomes effective, the ECHR system will be aligned with most of the supranational human rights organizations, providing for not only contentious, but also advisory, jurisdiction.

However, because of the interaction with the existing mechanisms for the protection of fundamental rights at the domestic as well as European levels, the effects of the protocol might become much wider than its drafters imagined. This could result not only in the expansion of the culture of “European rights,” but also in some shortcomings. In particular, the ECHR system could suffer asymmetries, considering not only the state of ratifications, but also the discretion left to national authorities in selecting the courts authorized to refer. Moreover, the new mechanism could have an effect on the existing balance between ordinary and Constitutional Courts in fundamental rights adjudication in Europe, with the risk of creating conflicts that, in the end, result in a decline in the level of protection of the rights of individuals.

Protocol No. 16 could trigger an ECtHR-based centralization of interpretation and, indirectly, of application of ECHR rights, while leaving a narrow margin of manoeuvre to national, and in particular constitutional, judges, in the interpretation of those rights based

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<sup>124</sup>AUGUSTO GUEVARA PALACIOS, LOS DICTÁMENES CONSULTIVOS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS. INTERPRETACIÓN CONSTITUCIONAL Y CONVENCIONAL 321–22 (2012).

<sup>125</sup> See Laurence Burgorgue-Larsen, *La Corte Interamericana de Derechos Humanos como Tribunal Constitucional*, in IUS CONSTITUTIONALE COMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 412–57 (Héctor Fix Fierro, Mariela Morales Antoniazzi & Armin von Bogdandy eds., 2014).

on national constitutional provisions. Hence, a reluctance in using the advisory opinion mechanism on the part of Constitutional Courts could be foreseeable—a reluctance, perhaps, comparable to that witnessed for many years of Constitutional Courts failing to fulfill their duty to use the preliminary reference procedure before the CJEU. By contrast, if the ECtHR interprets its power of docket control strictly, then the impact of the overall mechanism on its relationship with highest courts will be almost non-existent. Indeed, the text of the Protocol is left deliberately vague.

All in all, however, the advisory opinion mechanism in principle has the merit of allowing Constitutional Courts to engage in the protection of fundamental rights actively in coordination with the ECtHR, whereas heretofore such a direct link was lacking. In other words, it is for the Constitutional Courts to decide whether, in the framework of the ECHR system, they want to be mere recipients of the interpretation of fundamental rights provided by the ECtHR or also agents of fundamental rights in Europe.<sup>126</sup> The latest developments in terms of preliminary references to the CJEU by Constitutional Courts, which involve an increase in both the number of references and in the number of courts involved, show that, even where the cooperation with the CJEU is mandatory according to the EU treaties (and contrary to Protocol No. 16), in practice and despite the obligation, Constitutional Courts have eventually decided when to use Article 267 TFEU.

As the experience of the ICHR demonstrates, a cooperative attitude of courts could help in avoiding the possible shortcomings identified in the mechanism of Protocol No. 16. Favorable legislation and a supportive environment have been the ingredients that have allowed the Inter-American system to enjoy quite a wide consultative function,<sup>127</sup> insofar as the *locus standi* before the Court is concerned, as well as the number and type of subjects on which advisory opinions from the Court may be requested, the object (i.e., the texts on which the opinion may be requested), and the effects of the decision. Furthermore, through the advisory opinion function, the ICHR has developed a *pro-persona* interpretation, elaborating solid and advanced juridical conceptions directed at reinforcing its advisory competence.<sup>128</sup> However, some weaknesses have also emerged

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<sup>126</sup> See Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this *Special Issue*.

<sup>127</sup> In the practice of the Inter-American Court, the adoption of advisory opinions has developed considerably especially in the first phase of the life of the Court, primarily due to the reluctance of States to submit to the ICHR's adversarial jurisdiction. In fact, in the period of 1982–1989, the Court has issued its first ten advisory opinions or nearly half of those issued to date (total of twenty-one): two in 1982, one in 1983, one in 1984, one in 1985, two in 1986, two in 1987, and one in 1989. The same trend has been repeated in the early nineties (1990–1994), when the exercise of the adversarial jurisdiction was still very sporadic.

<sup>128</sup> In this sense, see *Other Treaties*, *supra* note 95, at para. 17, according to which with reference to Art. 64 “This text, which was broader than any similar contemporary international provision.” See also Fabian Salvioli, *La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarrollo jurisprudencial*, in HOMENAJE Y RECONOCIMIENTO A ANTÔNIO CANÇADO TRINDADE, T. III, 417–72 (S. Fabris eds., 2004).

within the Inter-American system, which mainly stem from the uncertainty of the effects of the decisions. At the same time, the activism of the ICHR with regard to the expansion of its advisory competence has generated the following consequences: it questions the international legality of obligations the Court may impose on States in those contentious judgments constructed on arguments expressed in the advisory opinion and it makes the practice of the Court to use arguments of contentious sources in advisory opinions somewhat confusing. Generally speaking, the highest courts of several Latin American countries—which, due to the characteristics of the prevalent model of constitutional justice in that area, have also to deal with constitutional review of legislation, thereby reflecting the U.S. model—have assumed a positive conduct.<sup>129</sup> The result is a dynamic interaction and a gradual reinterpretation of domestic law, without introducing a formal change.

Finally, the success of the mechanism introduced by Protocol No. 16 will depend on the elements analyzed in this article and concerning both the prospective attitude of Constitutional Courts and of the ECtHR as well as the prospective contents of its advisory opinions.

Likewise, the development of the triangular relationship between the CJEU, ECtHR, and Constitutional Courts needs to be explored in the light of Protocol No. 16 and EU accession to the ECHR, if and when it is achieved. From the point of view of Constitutional Courts, EU accession to the ECHR may further complicate the functioning of Protocol No. 16, as it would open up competing channels of communication, first of all with the EU preliminary reference, between national and supranational courts.

As has been pointed out, the complex intertwining of the new advisory opinion mechanism of the ECtHR and the preliminary reference procedure before the CJEU shows that there is a missing piece in this jigsaw. These mechanisms devise inter-judicial relationships that rely only upon the inputs of domestic courts, as if the CJEU and the ECtHR, in their respective domains, do not need to engage in the first place in a “conversation” with national judges,

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<sup>129</sup> This positive approach is resumed in the approach of the Constitutional Court of Peru, according to which it has referred to the ICHR as the “ultimate guardian of rights in the region,” underlining the necessity to take into consideration its interpretation. See Constitutional Court of Peru, 17 April 2002, Cartagena Vargas, no. 218-02-HC/TC, para. 2. The Constitutional Court of Peru considers that ICHR judgments—including advisory opinions—are binding for all public authorities, binding nature that “is not exhausted by its operative paragraphs, but extends to the *ratio decidendi*, even in those cases in which the Peruvian State has not been a party to the proceedings.” *Id.* at para. 36. On the same line is the Constitutional Court of Colombia. See Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 7 Tx. L. Rev. 1835–62 (2011). For a “negative approach” in the experiences of Argentina, Chile, and Venezuela, see Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 112–39 (Javier A. Couso, Alexandra Huneeus, & Rachel Sieder eds., 2013).

and particularly with Constitutional Courts.<sup>130</sup> Without the CJEU and the ECtHR being able to take steps forward towards constitutional judges, some of their decisions risk being detached from the constitutional systems from where the case arose, or risk exclusively focusing on the protection of a right without taking other competing public interests seriously (for example, in cases having an impact on welfare systems, still financed almost entirely by States, and on national budgets).<sup>131</sup> Hence, the establishment of a system of reverse referrals from the CJEU and the ECtHR, respectively, to Constitutional Courts, would perhaps appear appropriate. This could be used when doubts arise about the constitutional implications of a prospective EU or conventional judgment at the domestic level, especially when constitutional judges have had the opportunity to have a say on the pending case.<sup>132</sup> This way, the declared objective of Protocol no. 16, which is to strengthen the cooperation between highest domestic courts and the ECtHR, would be truly fulfilled, through the putting in place of a bi-directional relationship.

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<sup>130</sup> See Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this *Special Issue*.

<sup>131</sup> See, e.g., in matter of pensions, the case *Da Conceição Mateus v. Portugal*, App. Nos. 62235/12 and 57725/12, (Oct. 8, 2013), <http://hudoc.echr.coe.int/>, which took a different view to the Portuguese Constitutional Court in Decision no. 353/2012. By contrast, in Decision no. 264/2012, the Italian Constitutional Court, again on pensions, decided not to follow the judgment rendered on the same issue by the ECtHR in *Maggio and others v. Italy*, App. Nos. 46286/09, 52851/08, 53727/08, 54486/08, and 56001/08, (May 31, 2011), <http://hudoc.echr.coe.int/>. See Cristina Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, MAX WEBER PROGRAMME WORKING PAPERS (2014).

<sup>132</sup> In this context, the “Case-Law Exchange Network with Highest Courts,” recently established by the European Court of Human Rights, represents a crucial intermediate step.

## The Decision of the Austrian *Verfassungsgerichtshof* on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?

By Andreas Orator<sup>\*</sup>

### A. An “Instant Classic” Decision

In a landmark decision of 2012 on the relevance of the EU Charter of Fundamental Rights (CFR) in domestic constitutional adjudication, the Austrian *Verfassungsgerichtshof* (Constitutional Court) substantially extended the applicable yardstick, according to which the constitutionality of ordinary laws and administrative action may be assessed, to certain Charter rights.<sup>1</sup> At the same time, the *Verfassungsgerichtshof* claimed its active commitment to judicial dialogue with the Court of Justice of the European Union (CJEU) through the preliminary reference procedure pursuant to Article 267 TFEU to effectively protect Charter-based fundamental rights of individuals. Arguably, both the domestic and Union-wide ramifications of this “instant classic” case of a domestic constitutionalization of the Charter are substantial, delivering insight not least as to the transformative role of the Charter for domestic fundamental rights protection and the adaptations of domestic constitutional courts in such a changed environment.

In this article, the reasoning of the *Verfassungsgerichtshof* shall be traced back to its status as a domestic constitutional court, its rapport with the CJEU, as well as the overall relationship of Austrian constitutional law and EU law. In order to better understand the Court’s astonishing approach in its Charter decision, the profound impact of the entry into force of the binding and directly applicable CFR on fundamental rights protection in Austria needs to be taken into account. Following an assessment of the Charter judgment itself, the article seeks to investigate possible ramifications for the Austrian system of constitutional adjudication in general and the role of the *Verfassungsgerichtshof* as a fundamental rights court vis-à-vis other domestic supreme courts in particular. In all

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<sup>1</sup> VfSlg 19.632/2012. All quotes are taken from the judgment’s English translation made available by the *Verfassungsgerichtshof*, [http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtcharta\\_english\\_u466-11.pdf](http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtcharta_english_u466-11.pdf).

likelihood, the *Verfassungsgerichtshof* will employ the preliminary reference procedure more often and will become a more “active” player, especially with regard to the system of Charter rights protection.

### B. A “Model Pupil” Constitutional Court

Despite Austria’s accession to the EU only in 1995, its *Verfassungsgerichtshof* was still among the very first constitutional courts of an EU Member State to take recourse to the procedure of preliminary reference.<sup>2</sup> In Austria, it is commonly claimed that the *Verfassungsgerichtshof* was the first constitutional court of an EU Member State to refer questions to the CJEU. While being incorrect, this assertion might also indicate the character of a “model pupil” constitutional court which, from the outset, actively engages in a judicial dialogue with the CJEU.<sup>3</sup> To this can be added the fact that, in general, Austrian courts and tribunals have eagerly made use of the reference procedure, making Austria today the Member State with the second-most frequent usage of the preliminary reference procedure per capita.<sup>4</sup>

In 1999, four years into Austria’s EU membership, the *Verfassungsgerichtshof* considered a question of interpretation of European law to be relevant to deciding a domestic constitutional issue and accepted, without reservations, its obligation under EU law to refer it to the CJEU.<sup>5</sup> These and two other early referrals are notable not least because disputes relating to European law generally could not be argued before the *Verfassungsgerichtshof*, since the Court’s measuring yardstick was limited to formal Austrian constitutional law.<sup>6</sup> Theoretically, questions relating to EU law could raise unconstitutionality proceedings if EU law were to take precedence over a domestic norm,

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<sup>2</sup> See THEO ÖHLINGER & MICHAEL POTACS, EU-RECHT UND STAATLICHES RECHT. DIE ANWENDUNG DES EUROPARECHTS IM INNERSTAATLICHEN BEREICH 175 n. 706 (2014); Heinz Schäffer, *Österreich und die Europäische Union—Erfahrungen und Leistungen des österreichischen Verfassungsgerichtshofs*, 60 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 345, 378 (2005).

<sup>3</sup> For the first referral by the Belgian (then) *Cour d’arbitrage* see Case C–93/97, *Fédération belge des chambres syndicales de médecins ASBL v. Flemish Government*, Government of the French Community, Council of Minister, 1998 E.C.R. I–04837, see Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420, 432 (2013). The *Cour d’arbitrage* has been a member of the “Conference of European Constitutional Courts” since 1990 and was renamed *Cour constitutionnelle* in 2007. The Belgian Court’s referral dates from 1997, the Austrian *Verfassungsgerichtshof* referred its first case two years later, see VfSlg 15.450/1999.

<sup>4</sup> See BEDANNA BAPULY & GERHARD KOHLEGGGER, DIE IMPLEMENTIERUNG DES GEMEINSCHAFTSRECHTS IN ÖSTERREICH 583–737 (2003); Hannes Rösler, *Die Vorlagepraxis der EU-Mitgliedstaaten—Eine statistische Analyse zur Nutzung des Vorabentscheidungsverfahrens*, 47 EUROPARECHT 392, 398 (2012).

<sup>5</sup> VfSlg 15.450/1999. The Constitutional Court had accepted the CJEU’s supremacy case-law from the outset, see, in particular, VfSlg 14.886/1997.

<sup>6</sup> See in detail, *infra* at C.

be it either a constitutional norm or a domestic measure challenged before the *Verfassungsgerichtshof*. In the former case, Austrian constitutional law would no longer constitute the applicable yardstick given the blocking effect of directly applicable EU law.<sup>7</sup> In the latter case, the supremacy of EU law would result in what the Court understands as lack of “applicability,” which, however, is a decisive procedural requirement in cases of “concrete” judicial review.<sup>8</sup>

Thus, in the 1999 case, the *Verfassungsgerichtshof* pondered the consequences of its recognition of the supremacy of EU law over Austrian law for a domestic provision on partial energy tax refunds, which possibly violated provisions on state aid pursuant to (today’s) Article 103 TFEU. The challenged domestic measure would either be rendered inapplicable or have to be interpreted in conformity with EU law. In two subsequent cases, the Court referred further questions to the CJEU on the interpretation of EU law provisions possibly conflicting with a domestic measure.<sup>9</sup> Whilst following these three early referrals the *Verfassungsgerichtshof* did not initiate further preliminary reference proceedings until 2011, it should have been sufficiently clear that the Court was ready to accept and willing to activate this instrument of cooperation under EU law.<sup>10</sup> At the same time, however, EU law would still not constitute “a standard for its own judicial review.”<sup>11</sup>

### C. The Charter as a Domestic “Game Changer”

#### I. Three Apex Courts with Respective Functions

Traditionally, the three supreme judicial bodies—the *Verfassungsgerichtshof*, the *Verwaltungsgerichtshof* (Supreme Administrative Court), and the *Oberster Gerichtshof* (Supreme Court of Justice)—have been characterized as equally ranking peer courts, which have been attributed respective functions.<sup>12</sup> As for general judicial review, the jurisdiction

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<sup>7</sup> On this issue of “Präjudizialität,” cf. Michael Potacs, *Die Bedeutung des Gemeinschaftsrechts für das verfassungsgerichtliche Normprüfungsverfahren*, in *DAS VERFASSUNGSGERICHTLICHE VERFAHREN IN STEUERSACHEN* 245, 251 (Michael Holoubek & Michael Lang eds., 2010); Gerhard Baumgartner, *Verfassungsgerichtliche Normenkontrolle und EU-Recht*, 65 *ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT* 295, 305 (2010).

<sup>8</sup> See also for cases of individual complaints and differences from abstract review ÖHLINGER & POTACS, *supra* note 2, at 163–68.

<sup>9</sup> VfSlg 16.050/2000, VfSlg 16.100/2001.

<sup>10</sup> Michael Holoubek, *Das Verhältnis zwischen europäischer Gerichtsbarkeit und Verfassungsgerichtshof*, in *KOOPERATION DER GERICHTE IM EUROPÄISCHEN VERFASSUNGSVERBUND. GRUNDFRAGEN UND NEUESTE ENTWICKLUNGEN* 12, ÖSTERREICHISCHER EUROPARECHTSTAG 2012, 157, 163 (Christoph Grabenwarter & Erich Vranes eds., 2013).

<sup>11</sup> VfSlg 19.632/2012, para. 24, with further references

<sup>12</sup> Matthias Jestaedt, *Die (Möglichkeit einer) Gesetzesbeschwerde an den Verfassungsgerichtshof*, in *DIE VERWALTUNGSGERICHTSBARKEIT ERSTER INSTANZ* 395, 400 (Michael Holoubek & Michael Lang eds., 2013).



of the *Verfassungsgerichtshof* would only cover the “illegality” of domestic (administrative) regulations pursuant to Article 139 Federal Constitutional Act (B-VG) as well as the “unconstitutionality” of domestic laws pursuant to Article 140 B-VG, which does not entail primary or secondary EU law.<sup>13</sup> The Constitutional Court would be exclusively competent to strike down domestic regulations and laws;<sup>14</sup> in this sense, judicial review is concentrated before the *Verfassungsgerichtshof*,<sup>15</sup> which may and must remove from the domestic legal order provisions which are deemed incompatible with constitutional law.

The *Verfassungsgerichtshof* would also be the main fundamental rights court of the land: it is competent to repeal administrative decisions which violate constitutionally guaranteed rights. Furthermore, the review of legality of administrative decisions would be shared between the Supreme Administrative Court and the *Verfassungsgerichtshof*. It is noteworthy that EU law as a measuring yardstick would generally fall within the Supreme Administrative Court’s realm. While EU law generally would not qualify as a standard of review before the Constitutional Court, it consistently acknowledged in its case law that administrative breaches of EU law had to be equated with breaches of Austrian statutory provisions, whose compliance would be controlled by the *Verwaltungsgerichtshof*: “[A] violation of [EU] law would be tantamount to a violation of a simple (i.e. not of constitutional status) domestic law, which would be for the Supreme Administrative Court to address.”<sup>16</sup>

Finally, the jurisdiction of the *Oberster Gerichtshof* would mainly stretch to the legality review of civil and criminal cases. Originally, with the exception of “abstract” judicial review, parliamentary statutes on civil and criminal matters would not be reviewable by the *Verfassungsgerichtshof* unless the *Oberster Gerichtshof* referred a case to the Constitutional Court; under that “division of labor” of the constitution the *Oberster Gerichtshof* would independently consider whether a judicial decision complied with constitutionally guaranteed rights in particular and the Austrian constitution in general.<sup>17</sup> Recently, this balance of judicial powers has been modified, since there is now a right to file a complaint to the *Verfassungsgerichtshof* to constitutionally challenge regulations and statutes applicable in civil and criminal proceedings.<sup>18</sup>

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<sup>13</sup> See ÖHLINGER & POTACS, *supra* note 2, at 168.

<sup>14</sup> VfSlg 19.632/2012, para. 33.

<sup>15</sup> *Id.* at para. 41.

<sup>16</sup> See VfSlg 14.886/1997 (as quoted in the English translation of VfSlg 19.632/2012).

<sup>17</sup> Art. 92 Federal Constitutional Act (Bundes-Verfassungsgesetz, “B-VG”), cf. Eckhart Ratz, *Der Oberste Gerichtshof in Österreich als Grundrechtsgericht*, 73 ÖSTERREICHISCHES ANWALTSBLATT 274 (2013). See, however, the interlocutory proceedings for constitutionality review before the *Verfassungsgerichtshof*, Art. 89 para. 2 B-VG.

<sup>18</sup> The “*Subsidiarantrag auf Normenkontrolle*” came into effect on 1 January 2015, Federal Law Gazette BGBl. I 114/2013.

## *II. The Impact of the Charter*

The general “division of labor” among the three apex courts with regard to domestic constitutional and EU fundamental rights should be borne in mind when assessing the impact of the binding - and directly applicable—Charter of Fundamental Rights upon the entry into force of the Lisbon Treaty.<sup>19</sup> Given the very broad scope of application of the Charter, whose rights have to be observed in domestic legal disputes whenever Member States are “implementing” EU law pursuant to Article 51(1) CFR, many civil and administrative cases involving issues of Charter rights would have to be decided by the *Verwaltungsgerichtshof* or the *Oberster Gerichtshof*.<sup>20</sup>

As long as the *Verfassungsgerichtshof* would adhere to its formally restrictive approach for issues involving EU law in general, it would need to accept the compelling consequences flowing from the principle of supremacy of EU law (including Charter rights), the wide scope of application of EU law, and, subsequently, the CFR.<sup>21</sup> The Constitutional Court would often have to share its role as a “fundamental rights court” with the two other domestic apex courts, and, arguably, the CJEU as the final arbiter on the interpretation of CFR provisions.

### **D. Charter Rights as a Constitutional Yardstick**

#### *I. The Domestic Constitutionalization of the Charter*

It is against this backdrop that the *Verfassungsgerichtshof* rendered its landmark judgment of 14 March 2012.<sup>22</sup> Two non-EU citizens seeking asylum had been refused international protection pursuant to the Austrian Asylum Act, which, *inter alia*, was considered to transpose Directives 2004/83/EC and 2005/85/EC on minimum standards for the qualification and status of third country nationals as well as minimum standards on asylum procedures.<sup>23</sup> Pursuant to Article 51(1) of the Charter, the competent authorities, the

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<sup>19</sup> On the impact of the “visibility” of Charter rights, cf. Daniel Thym, *Die Reichweite der EU-Grundrechte-Charta—Zu viel Grundrechtsschutz?*, 32 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 889 (2013).

<sup>20</sup> See Andreas Orator, *Herausforderungen der österreichischen Verfassungsgerichtsbarkeit zur effektiven und legitimen Letztentscheidung unter Integrationsbedingungen*, in TAGUNGSBAND 53. ASSISTENTENTAGUNG ÖFFENTLICHES RECHT “DAS LETZTE WORT—RECHTSETZUNG UND RECHTSKONTROLLE IN DER DEMOKRATIE” 237, 244 (Dominik Elser *et al.* eds., 2014).

<sup>21</sup> On the scope of application of the Charter, see, *e.g.*, Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375 (2012).

<sup>22</sup> VfSlg 19.632/2012.

<sup>23</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal L 304/12, 30 September 2004, Council Directive

Federal Asylum Office and the Austrian Asylum Tribunal, were therefore under a duty to apply respective provisions of the Charter. In particular, the Federal Asylum Tribunal had dismissed the complainants' motion for oral hearing. Before the Constitutional Court, the complainants, therefore, exclusively argued that this dismissal violated their constitutionally guaranteed rights to an effective remedy and a fair trial according to Article 47(2) of the Charter.<sup>24</sup> They did not, however, invoke any fundamental right formally guaranteed under the Austrian Constitution as required under the proceedings of the (then) Article 144a B-VG.<sup>25</sup> When applying the above-mentioned restrictive case law of the VfGH on EU law not being a constitutional yardstick, the complaints could only have been dismissed from the outset.

Interestingly enough, however, the *Verfassungsgerichtshof* took a different course of action. It engaged in a surprisingly long discussion on the value of invoking Charter rights in constitutional proceedings in situations involving the implementation of EU law.<sup>26</sup> While it dismissed the complaints as unfounded, it held, *obiter*,<sup>27</sup> that in cases brought before it in which the Charter was generally applicable, those Charter rights which were "similar in its wording and purpose"<sup>28</sup> to fundamental rights guaranteed under Austrian constitutional law would henceforth be regarded as a formal constitutional yardstick against which the validity of administrative decisions and even general norms could be tested.

## II. The Role of the Principle of Equivalence

This surprising domestic constitutional appreciation of Charter rights "normatively follows,"<sup>29</sup> *inter alia*, from the Court's understanding of the EU principle of equivalence, which, under the case law of the CJEU, requires that as long as EU procedural rules are lacking, domestic "rules governing actions for safeguarding rights which individuals derive from [EU] law" apply

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2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326/13, 13 December 2005.

<sup>24</sup> VfSlg 19.632/2012, paras. 1–14.

<sup>25</sup> *Id.* at para. 16.

<sup>26</sup> On the traditional style of reasoning of the *Verfassungsgerichtshof*, which has been characterized as relatively "cautious" or "reserved," see Kurt Heller, *Die Anwendung der Grundrechte der Europäischen Union durch den Verfassungsgerichtshof*, 134 JURISTISCHE BLÄTTER 675 (2012).

<sup>27</sup> See Magdalena Pöschl, *Verfassungsgerichtsbarkeit nach Lissabon. Anmerkungen zum Charta-Erkenntnis*, 67 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 587, 602 (2012).

<sup>28</sup> VfSlg 19.632/2012, para. 35.

<sup>29</sup> Holoubek, *supra* note 10, at 166 n. 38 (relativising the Court's use of the principle of equivalence served as a mere "starting point and occasion"); cf. *Verfassungsgerichtshof*, B 166/2013-17, 12 March 2014, at n. 22.

provided, however, that such rules are *not less favourable* than those governing similar domestic actions [...] and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.<sup>30</sup>

From this and the Member States' obligation of sincere cooperation pursuant to Article 4(3) TEU, the *Verfassungsgerichtshof* concludes that, as a competent domestic court, it must ensure that "rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States."<sup>31</sup>

The Court then assesses the *Pontin* judgment of the CJEU, which calls upon the respective domestic court to "consider whether the actions concerned are similar as regards their purpose, cause of action, and essential characteristics",<sup>32</sup> and finds that the Charter entails "rights as they are guaranteed by the Austrian constitution in a similar manner as constitutionally safeguarded rights."<sup>33</sup>

At this point, it must be highlighted that many rights, which are guaranteed under the Austrian constitution, that is, Austrian fundamental rights, stem directly from the catalogue of the European Convention of Human Rights (ECHR), which enjoys constitutional rank in the Austrian legal order. In other words, Convention rights are part of the formal constitutional yardstick and can be directly invoked as constitutionally guaranteed rights.<sup>34</sup> Unsurprisingly, this peculiar situation alleviates the Court's search for "comparable" fundamental rights, since many fundamental rights protected under the ECHR served as models, "both in wording and intention"<sup>35</sup> for respective Charter rights. For instance, according to the Charter's Explanations, Article 47 CFR is directly based on the wording of Article 13 ECHR (in its first paragraph) and Article 6(1) ECHR (in its second paragraph); in its scope, however, Article 47(2) CFR is not limited to "disputes relating to civil law rights and obligations", but applies to "all rights guaranteed by Union law."<sup>36</sup>

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<sup>30</sup> Case C-326/96, B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd, 1998 E.C.R. I-07835, para. 18, with references to earlier case-law (italics not in original).

<sup>31</sup> VfSlg 19.632/2012, para. 29.

<sup>32</sup> Case C-63/08, Virginie Pontin v. T-Comalux SA, 2009 E.C.R. I-10467, para. 45.

<sup>33</sup> VfSlg 19.632/2012, para. 30.

<sup>34</sup> Federal Law Gazette BGBl. 59/1964.

<sup>35</sup> VfSlg 19.632/2012, para. 31.

<sup>36</sup> See the explanations to Article 47 CFR, Official Journal 2007 C 303/29.

Whilst the Court's reasoning is tied to its understanding of the EU principle of equivalence,<sup>37</sup> it is coupled with two main functions of the *Verfassungsgerichtshof*, namely its tasks as a quasi-centralized fundamental rights court<sup>38</sup> and as a "negative legislator"<sup>39</sup> (i.e., a centralized court to judicially review parliamentary acts and administrative regulations). From these EU and domestic principles, the *Verfassungsgerichtshof* concludes its domestic competence "to adjudicate on largely congruent rights"<sup>40</sup> in the Charter, both in fundamental rights proceedings as well as general judicial review proceedings.<sup>41</sup>

### *III. Partial Constitutionalization, Pronounced En Passant*

This approach evidently deviates from the previous case law of the *Verfassungsgerichtshof* on the value of (parts of) EU law in constitutional proceedings.<sup>42</sup> Nevertheless, the Court seems to be keen to contain its overruling of the former general non-invocability of EU law in constitutional proceedings by limiting the effect to certain Charter rights only. In order to do so it aims at, first, presenting the Charter as "an area that is markedly distinct from the 'Treaties.'"<sup>43</sup> Second, it confines its new approach to Charter rights "similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution,"<sup>44</sup> that is, in particular congruent rights under the ECHR. Third, it reserves its right "to decide on a case-by-case basis" which Charter provisions contain (comparable) "rights" and which would rather constitute (non-comparable) "principles" according to Article 51 CFR.<sup>45</sup>

Finally, the *Verfassungsgerichtshof* draws on the argument of codification of EU fundamental rights, deriving from general principles of law which had been developed by CJEU case law, as sufficient a leap to accept (only) certain "codified" Charter rights as a national standard of review in constitutional proceedings: "[T]he applicability of a detailed

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<sup>37</sup> However, see the qualification, *supra* note 29.

<sup>38</sup> VfSlg 19.632/2012, para. 33 ("The system of legal protection set out in the Federal Constitutional Act provides in general for a concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court [ . . . ]").

<sup>39</sup> Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRICHTSLEHRER (1929) 26 ("negativer Gesetzgeber").

<sup>40</sup> VfSlg 19.632/2012, para. 34.

<sup>41</sup> Art. 144 B-VG as well as Arts. 139–140 B-VG.

<sup>42</sup> See Franz Merli, *Umleitung der Rechtsgeschichte*, 20 J. FÜR RECHTSPOLITIK 355, 355–356 (2012).

<sup>43</sup> VfSlg 19.632/2012, para. 25.

<sup>44</sup> *Id.* at para. 35.

<sup>45</sup> *Id.* at paras. 34, 36.

catalogue of rights and duties as set out in the [CFR] is not comparable to the derivation of legal positions from general legal principles.”<sup>46</sup>

For the sake of that argument, the *Verfassungsgerichtshof* had to ignore the fact that the CJEU not only regularly drew on the similarly detailed and, in particular, written, fundamental rights catalogue of the ECHR when sketching out the contents of such principle-based fundamental rights. What is more, already the pre-Lisbon version of Article 6(3) TEU had explicitly referred to the standard of those general principles “as guaranteed by the” written catalogue of the ECHR.

The *Verfassungsgerichtshof* seeks to further legitimate its discriminate treatment of (certain) EU fundamental rights based in the Charter on the one hand and other EU fundamental rights (or, for that matter, other directly invocable provisions guaranteed by the Treaties) by the new wording of Article 6 TEU. One cannot help but describe its respective citation as distorting. The Court cites the passage of “the Charter of Fundamental Rights and the Treaties,” to underline the distinctiveness of the Charter as opposed to the Treaties, yet omits the subsequent wording of Article 6(1) TEU that states that both instruments “shall have the same legal value.”<sup>47</sup> This omission is all the more surprising since the *Verfassungsgerichtshof*, only several paragraphs earlier, had correctly presented the Charter as EU primary law which had been explicitly attributed the same legal value as the Treaties pursuant to Article 6(1) TEU.<sup>48</sup> From these and other arguments it becomes obvious that the *Verfassungsgerichtshof* was eager to confine the effect of the equivalence principle to rights arising from the Charter as opposed to directly applicable rights arising from other sources of EU primary law and not completely overrule its previous case law. The astounding result of this partial constitutionalization of EU primary law thus comes at the price of considerable argumentative inconsistencies.

What is more, the Court’s eventual dismissal of the case – it did not find a violation of Article 47(2) CFR for lack of an oral hearing before the Austrian Asylum Tribunal – turned the bold argumentative move of the *Verfassungsgerichtshof* into a drop of bitterness for the complainants, who relied exclusively on constitutional arguments, which would have been futile from the outset before this constitutionalization of the Charter. The Court apparently took the first case which had come along to modify its case law after having made the necessary preparations.<sup>49</sup> It did not wait for a case involving an actual violation

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<sup>46</sup> *Id.* at para. 38.

<sup>47</sup> See Pöschl, *supra* note 27, at 591–92.

<sup>48</sup> VfSlg 19.632/2012, para. 18.

<sup>49</sup> On those, see the earlier literary statement of Justice Rudolf Müller, *Verfassungsgerichtsbarkeit und Europäische Grundrechtecharta*, 67 ÖSTERREICHISCHE JURISTEN-ZEITUNG 159 (2012).

of constitutionalized Charter rights, turning its reasoning in an exceptionally extensive *obiter dictum*.<sup>50</sup>

As a result, Charter rights such as Article 47(2) CFR would henceforth be regarded as a formal constitutional yardstick against which the constitutional validity of administrative decisions and even general norms could be tested. In that vein, the *Verfassungsgerichtshof* has, since then, declared further Charter rights to be constitutionally guaranteed rights.<sup>51</sup> More recently, on the grounds of a violation of Article 47(2) CFR the *Verfassungsgerichtshof* invalidated several administrative decisions, and, in its exercise of general judicial review, declared a statutory provision unconstitutional.<sup>52</sup> Thus, it has become the first constitutional court of an EU Member State to apply parts of the Charter as a constitutional standard of review.<sup>53</sup>

### E. Judicial Cooperation Coming with Strings Attached?

Apart from this spectacular move to partially constitutionalize the Charter for the Austrian legal order, the *Verfassungsgerichtshof* is keen to reiterate its readiness to cooperate with the CJEU by referring relevant issues of interpretation of EU law to the Luxembourg court for a preliminary ruling.<sup>54</sup> However, the Charter decision leaves room for questions as to whether the Constitutional Court's commitment to judicial cooperation under the procedure pursuant to Article 267 TFEU is fully in line with CJEU case law.

First of all, the *Verfassungsgerichtshof* seems to interpret the *CILFIT* doctrine of the CJEU, providing for exceptions to Article 267 TFEU situations,<sup>55</sup> in a way that the criterion of "irrelevance" of the issue should also apply "if a constitutionally guaranteed right,

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<sup>50</sup> Heller, *supra* note 26, at 675. It took the Court another year to actually invalidate a decision based on a violation of Charter rights, see *infra*, note 52.

<sup>51</sup> See Arts. 7, 8, 11, 15, 16, and 21 para. 1 CFR; cf. VfSlg 19.673/2012, VfSlg 19.702/2012, VfSlg 19.749/2013, Case B 166/2013.

<sup>52</sup> See, e.g., Case U 1257/2012, 26 June 2013. Since the Charter decision, the *Verfassungsgerichtshof* has reversed about a dozen administrative decisions, so far almost exclusively on the grounds of violations of the right to an oral hearing under Article 47, paragraph 2 CFR. For the same reasons, on one occasion the *Verfassungsgerichtshof* declared unconstitutional an already expired provision of the Federal Asylum Tribunal Act, exercising general judicial review based on the Charter as a constitutional yardstick for the first time, Case G 86/2013, 27 February 2014.

<sup>53</sup> On other European Constitutional Courts, see Maartje De Visser, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a post-Charter Landscape*, 14 HUM. RTS. REV. 1 (2013).

<sup>54</sup> VfSlg 19.632/2012, para. 40.

<sup>55</sup> Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415, Case C-495/03, Intermodal Transports BV v. Staatssecretaris van Financiën, 2005 E.C.R. I-8151.

especially a right of the ECHR, has the same scope of application as a right of the [CFR].”<sup>56</sup> The *Verfassungsgerichtshof* concludes that in these instances it would rest its decision on a congruent fundamental right under formal domestic constitutional law, to which ECHR rights belong rather than on an equivalent Charter right, refraining from referring a respective question at hand to the CJEU. To say the least, it is far from clear that the CJEU holds an identical understanding of the relevance criterion of the CILFIT doctrine,<sup>57</sup> which is why this issue should be eventually decided by the CJEU itself.

What is more, it has already become evident that the Constitutional Court’s interpretation of the principle of equivalence is anything but clearly based in CJEU case law.<sup>58</sup> According to the *Verfassungsgerichtshof*, the principle of equivalence requires that directly applicable Union rights “must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States.”<sup>59</sup> The Constitutional Court seems to imply that rather than equivalent legal protection, identical procedures in cases of comparable rights are warranted.<sup>60</sup> As supporting evidence, the *Verfassungsgerichtshof* cites a passage from the CJEU’s *Pontin* judgment:

The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of [EU] law or national law, where the purpose and cause of action are similar.<sup>61</sup>

When continuing its quotation from the *Pontin* judgment, the Court omits the following sentence: “However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions [...].”<sup>62</sup> It is striking that the *Verfassungsgerichtshof* did not refer to a CJEU statement which clearly excluded an understanding of the principle of equivalence demanding the “most favourable” or even identical procedure. Domestically, there are good reasons to take the view that the

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<sup>56</sup> VfSlg 19.632/2012, para. 44.

<sup>57</sup> See Pöschl, *supra* note 27, at 598.

<sup>58</sup> Merli, *supra* note 42, at 356–57.

<sup>59</sup> VfSlg 19.632/2012, para. 29.

<sup>60</sup> See Merli, *supra* note 42, at 356.

<sup>61</sup> Case C–63/08, *Virginie Pontin v. T-Comalux SA*, 2009 E.C.R. I–10467, para. 45, as cited in VfSlg 19.632/2012, para. 29.

<sup>62</sup> *Id.* at para. 45.



procedures at hand before the *Verwaltungsgerichtshof* as an “EU fundamental rights court”<sup>63</sup> are generally *not* unfavorable.<sup>64</sup>

Thus, the Charter decision of the *Verfassungsgerichtshof* entails a number of important issues of interpretation of EU law, some of which are even essential to delivering the Court’s conclusion for partial constitutionalization of the Charter. Arguably, some of these issues do not fall under the category of an *acte clair* and, therefore, should have been referred to the CJEU.<sup>65</sup> One is tempted to speculate about the reasons for which the *Verfassungsgerichtshof*, traditionally and ostensibly committed to judicial cooperation under Article 267 TFEU, chose not to present these issues as triggering a duty under EU law to seek a preliminary judgment.<sup>66</sup> Here, the idea suggests itself that the Constitutional Court precisely sought an EU law-based “leverage” to constitutionalize Charter rights, which it found in a *possible*, but in all likelihood not *compelling* interpretation of the principle of equivalence. Under that assumption, the *Pontin* or *Levez* case law of the CJEU strongly indicates that a referral would not have “delivered” the interpretive results that the *Verfassungsgerichtshof* might have wished for from the CJEU. In that respect, the Charter decision, despite its clear language of commitment to cooperation with the CJEU, remains ambiguous.

To this can be added a number of complications resulting from the traditional understanding of a non-hierarchical relationship of the three Austrian apex courts. It hardly came as a surprise that the Charter decision met with judicial reactions by the other two supreme courts.<sup>67</sup> Less than a year after the Charter decision, the *Oberster Gerichtshof* challenged the Constitutional Court’s questionable understanding of the principle of equivalence and referred, *inter alia*, a question to the CJEU under Article 267 TFEU which also aimed at an interpretation of the principle of equivalence.<sup>68</sup> In its preliminary ruling,

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<sup>63</sup> Michael Potacs, *Rechte der EU-Grundrechte-Charta als verfassungsgesetzlich gewährleistete Rechte*, 134 JURISTISCHE BLÄTTER 503, 511 (134); see also the reaction of the *Verwaltungsgerichtshof* in Case 2013/15/0196, 23 January 2013.

<sup>64</sup> See Pöschl, *supra* note 27, at 594–95.

<sup>65</sup> See *id.* at 597.

<sup>66</sup> In particular, see the Court’s fragmented citation of the *Pontin* case; cf. Merli, *supra* note 42, at 356 n. 2; further, see the relativization in the Constitutional Court’s follow-up case-law, e.g. Case B 166/2013–17, 12 March 2014, para. 22; see Pöschl, *supra* note 27, at 603; Christoph Brenn, *VfGH versus Unionsrecht*, 67 ÖSTERREICHISCHE JURISTEN-ZEITUNG, 1062, 1065 (2012).

<sup>67</sup> For a literary reaction, see, e.g., Ratz, *supra* note 17, at 278.

<sup>68</sup> Order of the *Oberster Gerichtshof* for a preliminary ruling, 17 December 2012, 9 Ob 15/12i; see CJEU, Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 27 (“In the case of rules of procedural law under which the ordinary courts called upon to decide on the substance of cases are also required to examine whether legislation is unconstitutional but are not empowered to repeal legislation generally, this being reserved for a specially organised constitutional court, does the ‘principle of equivalence’ in the implementation of European Union law

the CJEU reiterated its previous case law as prescribing the application of “detailed procedural rules governing actions for safeguarding an individual’s rights under EU law [...] *no less favourable* than those governing similar domestic actions.”<sup>69</sup> However, yet rather unsurprisingly, the CJEU avoided directly commenting on the Constitutional Court’s interpretation of the principle of equivalence, which the *Oberster Gerichtshof* had obviously wished for.<sup>70</sup> Rather, the CJEU identified, “from the reasoning of the order for reference,”<sup>71</sup> the relevant question in the issues of domestic, possibly constitutional, interlocutory proceedings with a view to Article 267 TFEU obligations of ordinary courts as well as in the principle of primacy of EU law.

There, the CJEU rather positively perceived the Constitutional Court’s reference to its earlier case law on that matter.<sup>72</sup> In its Charter decision, the *Verfassungsgerichtshof* had raised that issue:<sup>73</sup> In the *Melki and Abdeli* judgment the CJEU argued that such interlocutory proceedings could be compatible with Article 267 TFEU as long as, *inter alia*, “national courts or tribunals remain free to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary.”<sup>74</sup>

Thus, the constitutionalization of Charter rights, taken together with a national procedural provision requiring ordinary courts to request the invalidation of domestic legislation deemed unconstitutional, must not in any way limit the unconditional right of the national court to refer preliminary questions to the CJEU. In a sense, this reflects the traditional *Simmenthal* principle that “it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means,”<sup>75</sup> for otherwise the effectiveness of the procedure under Article 267 TFEU could be impaired. In its order for a preliminary ruling, the *Oberster Gerichtshof* seemed to take up precisely that possible

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mean that, where legislation infringes [Art 47 CFR], the ordinary courts are also required, in the course of the proceedings, to request the constitutional court to set aside the legislation generally, and cannot simply refrain from applying that legislation in the particular case concerned?”).

<sup>69</sup> Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 45, quoting from previous case-law (*italics added*).

<sup>70</sup> In its order for a preliminary ruling, the *Oberster Gerichtshof* cites from the Charter decision, see order of the *Oberster Gerichtshof* for a preliminary ruling, 17 December 2012, 9 Ob 15/12i, section 3.7.

<sup>71</sup> Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 29.

<sup>72</sup> *Id.* at para. 32.

<sup>73</sup> VfSlg 19.632/2012, para. 42.

<sup>74</sup> Joined Cases C–188/10 and C–189/10, Aziz Melki and Sélim Abdeli, 2010 E.C.R. I–5665, para. 57.

<sup>75</sup> Case C–106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629, para. 24.

blocking effect of the *Melki* case law with regard to Article 89 paragraph 2 B-VG, which obliges ordinary courts, if they consider an applicable general norm to be unconstitutional, to refer the issue to the *Verfassungsgerichtshof* as the centralized authority for judicial review. To the disappointment of the *Oberster Gerichtshof*, the CJEU did not (have to) take sides, but only generally pointed to the importance of compliance with the *Melki* criteria.<sup>76</sup>

At closer inspection, therefore, the Constitutional Court's offer to cooperate seems to be incomplete and possibly inconsistent, whereas the constitutionalization of parts of EU fundamental rights openly challenges the previous "division of labour" between three domestic apex courts.<sup>77</sup>

#### F. Preserving Endangered Functions?

The outcome of the Charter decision, that is, the partial domestic constitutionalization of an EU catalogue of fundamental rights, undoubtedly represents a landmark case both under Austrian constitutional law and under EU law. From the outside, the motives for this rather spectacular decision, remain, however, less clear. Nonetheless, one might trace the Court's general motives from the judgment's language, from the literary comments of a number of (former) constitutional justices, and from the academic debate on the judgment.

Here, the affirmation of the role of the *Verfassungsgerichtshof* as a quasi-exclusive fundamental rights court of last resort and as the "monopolist" of general judicial review runs like a central theme throughout the Charter decision.<sup>78</sup> With a view to the entry into force of a directly applicable Charter, blocking the application of conflicting national rules including national fundamental rights, the *Verfassungsgerichtshof* proved to have a good sense of the profound impact of the Charter on the exercise of these central constitutional functions.<sup>79</sup> In that sense, the Charter decision might be viewed as a "rearguard action" to protect those functions of the Constitutional Court which it considered to be at risk due to a directly applicable Charter.<sup>80</sup>

Insofar as its role as a quasi-exclusive fundamental rights court is concerned, the Constitutional Court fears the multiplication of actors competent to decide on fundamental rights issues. Under the Charter, each national court and tribunal would

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<sup>76</sup> Case C-112/13, A v. B and Others, 2014 E.C.R. I-00000, para. 46.

<sup>77</sup> For a reaction of the other supreme court, see *Verwaltungsgerichtshof*, Case 2013/15/0196 of 23 January 2013.

<sup>78</sup> On the "guiding function" of the Constitutional Court, cf. Holoubek, *supra* note 10, at 166.

<sup>79</sup> Already on similar "fears" after Austria's accession to the EU, see Schäffer, *supra* note 2, at 371.

<sup>80</sup> See Pöschl, *supra* note 27, at 590.

become an “EU fundamental rights court”; as apex courts of all civil and criminal or administrative courts, the *Oberster Gerichtshof* and the *Verwaltungsgerichtshof* would be strengthened, let alone the CJEU via the Article 267 TFEU procedure. In that vein, the Charter decision might be viewed as a countervailing action by providing several instruments to compensate for such a partial functionary loss.<sup>81</sup> In a remarkable literary statement heralding the Charter decision, Justice Müller unmasked the tone of the Court’s alternative of inaction: the *Verfassungsgerichtshof* would “abdicate” in favor of ordinary and administrative courts and would utterly “surrender” the constitutional function of being a guardian of fundamental rights.<sup>82</sup>

Concerning the Court’s function as to centralized judicial review, that is, the right to remove general norms from the legal order due to their unconstitutionality, the *Verfassungsgerichtshof* seems to fully understand the threat that the primacy of directly applicable EU norms in general and Charter provisions in particular might pose to its function. To the extent that national authorities abide by the principle of the primacy of the (broadly applicable) Charter provisions and simply disapply conflicting national provisions, the Constitutional Court as a “negative legislator,” charged with eliminating unconstitutional norms from the legal order, could even become superfluous;<sup>83</sup> the additional task of formally removing inapplicable and also unconstitutional norms from the legal order could be performed by the parliamentary legislator.<sup>84</sup>

In its Charter decision, the *Verfassungsgerichtshof* infers from the principle of equivalence that administrative decisions or general norms contravening Charter rights are to be annulled or struck down in proceedings before the *Verfassungsgerichtshof*. This leads one to ask whether such an alternative system of legal protection would not eventually amount to an aggravation compared to the *status quo ante*: Under the proposed system, a citizen would often need to use an additional procedure before the *Verfassungsgerichtshof* to strike down the conflicting provision, whereas other authorities could simply disregard the domestic provision which violated Charter rights.<sup>85</sup> One of the most convincing critiques of

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<sup>81</sup> See Müller, *supra* note 49, at 167; Brenn, *supra* note 66, at 1065; Merli, *supra* note 42, at 359. Citing from that literature, one justice admits to these “explanations” for the Charter decision, see Holoubek, *supra* note 10, at 169.

<sup>82</sup> Müller, *supra* note 49, at 167. To the extent that these instruments developed through the Charter decision relate to an intensified relationship with the CJEU, see *infra* at G.

<sup>83</sup> However on this function of “Rechtsbereinigung,” i.e. “removal” of conflicting domestic law, see already VfSlg 19.632/2012, para. 33.

<sup>84</sup> See Brenn, *supra* note 66, at 1065.

<sup>85</sup> See Pöschl, *supra* note 27, at 596.

the Charter decision demonstrates that such a longer procedure might result in a situation in which a citizen could be eventually even worse off.<sup>86</sup>

Clearly, the Constitutional Court anticipated the shift of balance in the separation of judicial powers with regard to its function as a fundamental rights court. The Charter decision may therefore be read as an attempt to counter or even “override” the other supreme courts’ potentially enhanced roles as EU fundamental rights courts.<sup>87</sup> Irrespective of its future role under Article 267 TFEU, the Constitutional Court’s fear of losing control over the judicial development of fundamental rights protection in Austria seems not only to be justified, but also inevitable in view of the functioning of the EU principles of primacy and effectiveness. Seen in this light, the Charter decision might be a rather symbolic and ostensive “act of self-assertion of a constitutional court,”<sup>88</sup> coming closely, therefore, to a “rearguard action” vis-à-vis the other domestic apex courts.

#### G. An Instrument of “Leverage”

Far from that, the *Verfassungsgerichtshof* arguably comprehended the leveraging potential of the “Charterization” of fundamental rights control. Not only did it grasp the potential impact of the Charter on domestic fundamental rights protection, but its Charter judgment may also be seen as a measure of empowerment, seizing an early opportunity to co-shape the future of European fundamental rights protection together with the CJEU through the preliminary reference procedure. In this vein, Justice Holoubek called the decision an “offer for a European fundamental rights community.”<sup>89</sup>

As a young fundamental rights catalogue, containing many “untested” Charter rights, an unclear distinction between rights and principles, and a number of unresolved horizontal issues relating to the relationship between the Charter, the Convention, and domestic fundamental rights, the Charter will have to be fleshed out through case law of the CJEU. The *Verfassungsgerichtshof* seems prepared to make intensified use of the preliminary reference procedure to actively shape that future EU fundamental rights case law and, therefore, to leverage its influence on a European scale. In that sense, the Constitutional Court “dialogue” with the CJEU does not only go well beyond, but is diametrical to, the

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<sup>86</sup> Merli, *supra* note 42, at 357.

<sup>87</sup> However, see the unaltered case law of the *Verwaltungsgerichtshof*, Case 2013/15/0196, 23 January 2013.

<sup>88</sup> Stefan Mayr, *Verfassungsgerichtlicher Prüfungsgegenstand und Prüfungsmaßstab im Spannungsfeld nationaler, konventions- und unionsrechtlicher Grundrechtsgewährleistungen*, ZEITSCHRIFT FÜR VERWALTUNG 401, 409 (2012).

<sup>89</sup> Holoubek, *supra* note 10, at 166.

traditional resolution mechanisms (such as the “*Solange*” doctrines) of conflicting fundamental rights protection regimes.<sup>90</sup>

In order to better understand the Constitutional Court’s willingness to internalize an international fundamental rights catalogue, one needs to point to the peculiar status of the ECHR within the Austrian legal order. Besides its status as an international treaty that the Republic of Austria adheres to, the ECHR was incorporated into domestic law, meaning that it formally enjoys constitutional rank. For more than 50 years, and more intensively than most other constitutional courts in Europe, the *Verfassungsgerichtshof* has been citing judgments of the Strasbourg Court.<sup>91</sup> ECHR fundamental rights are now inherent in the domestic fundamental rights culture.<sup>92</sup> Consequently, in practice the Constitutional Court is not at all adverse to referring to “European” fundamental rights in its domestic jurisprudence. Taking recourse to another “European” catalogue of fundamental rights such as the CFR, which, in addition, both in substance and procedure is closely intertwined with the ECHR, might therefore be more easily acceptable than for other constitutional courts and might have additionally reassured the Court of the feasibility of their approach in the Charter decision.

It is here that the *Verfassungsgerichtshof* offers the CJEU its services to become a “privileged partner” in a judicial dialogue in what has been described as filtering domestic cases, clarifying them on their own, preparing them for the CJEU, and adapting the preliminary rulings for the peculiarities of the domestic legal order.<sup>93</sup> The Constitutional Court could also support the CJEU in coordinating the respective overall concepts of fundamental rights interpretations.<sup>94</sup> In a “division of labour”<sup>95</sup> between the CJEU and the Constitutional Court, the latter would act as a kind of gatekeeper and clearing house for national cases.

In case of congruence of Charter rights with domestic ECHR rights, and given the existence of relevant case law of the European Court of Human Rights (ECtHR), national constitutional courts could decide autonomously “in the sense of the principle of

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<sup>90</sup> See Komárek, *supra* note 3, at 422. On the function of “*Solange*” doctrines within the judicial dialogue of the CJEU and national courts, see Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L. J. 511 (2010).

<sup>91</sup> See Christoph Grabenwarter, *Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes*, 20 J. FÜR RECHTSPOLITIK 298, 299 (2012).

<sup>92</sup> See *id.* at 304.

<sup>93</sup> Merli, *supra* note 42, at 360; Holoubek, *supra* note 10, at 167.

<sup>94</sup> See Holoubek, *supra* note 10, at 168.

<sup>95</sup> Heller, *supra* note 26, at 677; Grabenwarter, *supra* note 91, at 304.

subsidiarity.”<sup>96</sup> Here, the *Verfassungsgerichtshof* must have also had in mind the overloaded ECtHR, suggesting leaving more room to develop domestic case law on Charter rights.<sup>97</sup> In this respect, the Charter decision may be read as bringing the Constitutional Court “back into the equation”<sup>98</sup> by fully realizing the Court’s potential to shape the future content of the Charter in particular and of European fundamental rights protection in general.

In keeping with this strategy of “Charterization” of fundamental rights control, the *Verfassungsgerichtshof* referred, only months after its Charter decision, several questions concerning the Data Retention Directive and Charter provisions for a preliminary ruling. The main question related to the validity of several provisions of the contested Data Retention Directive in the light of Articles 7, 8, and 11 of the Charter.<sup>99</sup> In that sense, the Constitutional Court reinforced its statements from the Charter decision with regard to its obligations under Article 267 TFEU, that is, to refer not only question of interpretation of Charter provisions, but also questions of the conformity of EU secondary law with the Charter.<sup>100</sup> To this was added a set of five detailed interpretive questions, regarding the scope and interpretation of rights and principles (Article 52 CFR, the right to respect for private and family life (Article 7 CFR), and the right to protection of personal data (Article 8 CFR)).<sup>101</sup> Again, the Charter decision may thus also be seen as an act of “self-assertion”;<sup>102</sup> in procedures for a preliminary ruling, national constitutional courts may significantly

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<sup>96</sup> Grabenwarter, *supra* note 91, at 304.

<sup>97</sup> See Müller, *supra* note 49, at 168.

<sup>98</sup> Merli, *supra* note 42, at 360; Müller, *supra* note 49, at 165; Clemens Jabloner, *Das Verhältnis zwischen europäischer Gerichtsbarkeit und Verwaltungsgerichtshof*, in KOOPERATION DER GERICHTE IM EUROPÄISCHEN VERFASSUNGSVERBUND. GRUNDFRAGEN UND NEUESTE ENTWICKLUNGEN, 12. ÖSTERREICHISCHER EUROPARECHTSTAG 2012, 171, 183 (Christoph Grabenwarter & Erich Vranes eds., 2013).

<sup>99</sup> See VfSlg 19.702/2012 and CJEU, Joined Cases C–293/12 and C–594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 2014 E.C.R. I–00000, para. 21.

<sup>100</sup> VfSlg 19.702/2012, para. 27.

<sup>101</sup> See, e.g., the first question: “In the light of the explanations relating to Article 8 of the Charter, which, according to Article 52(7) of the Charter, were drawn up as a way of providing guidance in the interpretation of the Charter and to which regard must be given by the *Verfassungsgerichtshof*, must [Directive 95/46] and Regulation (EC) No 45/2001 of the European Parliament and of the Council [of 18 December 2000] on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [OJ 2001 L 8, p. 1] be taken into account, for the purposes of assessing the permissibility of interference, as being of equal standing to the conditions under Article 8(2) and Article 52(1) of the Charter?”, CJEU, Joined Cases C–293/12 and C–594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 2014 E.C.R. I–00000, para. 21.

<sup>102</sup> Mayr, *supra* note 88, at 409.

contribute to the interpretative work of the CJEU. It is likely that the *Verfassungsgerichtshof* will follow suit in other Charter cases.

## H. Conclusion

By comparison to its earlier case law, the Charter decision of the *Verfassungsgerichtshof* represents a remarkable example of activist judicial constitutionalization.<sup>103</sup> Despite its argumentative inconsistencies, the decision provides evidence of a court's consciousness of the profound impact of a directly applicable EU fundamental rights catalogue on its traditional constitutional functions. On the one hand, the Court's reaction to a shift of judicial powers towards the other domestic apex courts as well as the CJEU with regard to its function as a fundamental rights court resulted in a rather symbolic "rearguard action" vis-à-vis the other two supreme courts. On the other hand, the *Verfassungsgerichtshof* pledges to actively engage in a judicial dialogue with the CJEU to effectively protect Charter-based fundamental rights of individuals. In doing so, the Constitutional Court recognizes a substantial leveraging potential to shape European fundamental rights under the auspices of the Charter together with the CJEU.

The Court's domestic adjudicatory functions as a "negative legislator" and as a fundamental rights court, which have both been limited under the influence of Europeanization, are then complemented by the dialogical function of the network of European constitutional courts.<sup>104</sup> In this respect, this development fits well with the emerging concept of a "*Verfassungsgerichtsverbund*,"<sup>105</sup> a compound of the CJEU and national constitutional courts.<sup>106</sup>

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<sup>103</sup> This is to be contrasted with the "constitutionalization" of another European fundamental rights catalogue, the ECHR, through formal constitutional amendment. See Orator, *supra* note 20, at 248.

<sup>104</sup> Another indication of the Constitutional Court's awareness for and willingness to use this dialogical function are the (prompt) publications of English translations of important judgments of the *Verfassungsgerichtshof*, see, e.g., VfSlg 19.632/2012 (Charter decision), VfSlg 19.702/2012 (referral of the Data Retention Directive case).

<sup>105</sup> Andreas Voßkuhle, *Der europäischer Verfassungsgerichtsverbund*, 29 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1 (2010).

<sup>106</sup> In favor of such a "dialogue on the same subject in a common language," see Holoubek, *supra* note 10, at 167.





## Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court

By Giorgio Repetto \*

### A. Introduction

In the ongoing debate about preliminary references raised by constitutional courts, the Italian *Corte costituzionale* (Constitutional Court, hereafter, ICC) is apparently a latecomer. Despite its pivotal role in the founding era in which the relationships between Community law and national legal orders were assessed, its reluctance towards preliminary references to the ECJ (since 2009: Court of Justice of the European Union, CJEU)<sup>1</sup> has repeatedly been invoked as a standard in legal scholarship. Whereas from the early 1960s onwards it engaged dialectically with the CJEU, and contributed to some basic tenets of EC law *vis-à-vis* national law (direct effect, primacy, limits concerning basic constitutional principles, so-called *counter-limits*),<sup>2</sup> it appeared for a long time to be almost silent on the crucial aspect concerning its ability to enter into a direct dialogue with the CJEU via the preliminary reference procedure. Although this ambivalence may appear contradictory, one should not forget that behind the scenes, dialogue took place along indirect or “hidden” channels. Either in response to claims raised by the judiciary in *incidenter* proceedings, or in adjudicating disputes between State and Regions in *principaliter* ones, the ICC often sent messages and alerts to the CJEU. In so doing, it indirectly contributed to shaping the relationships between EU law and domestic law.<sup>3</sup> In the long run, the absence of the ICC’s direct involvement in the relationships with the CJEU has, however, estranged its action from the core of EU law in favor of the partnership between the CJEU and the common judges (both ordinary and administrative).<sup>4</sup>

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<sup>1</sup> For the sake of uniformity, throughout the present article I will use the current denomination of the Court even when I refer to pre–2009 cases and situations, whereas EU law is used to refer to Union law in general.

<sup>2</sup> Like in the seminal *Costa* (judgment 7. March 1964, no. 14), *Frontini* (judgment 17. Decembrer 1973, no. 183) and *Granital* (judgment 8. June 1984, no. 170) cases. All judgments and orders of the ICC are available at <http://www.cortecostituzionale.it/actionPronuncia.do>. A selection of recent cases (since 2006) translated into English is available at [http://www.cortecostituzionale.it/ActionPagina\\_1260.do](http://www.cortecostituzionale.it/ActionPagina_1260.do).

<sup>3</sup> For an insightful overview on hidden dialogue, see Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring the Techniques of ‘Hidden Dialogue,’* 21 K.L.J. 257 (2010).

<sup>4</sup> Moving from the functions demanded of Constitutional Courts in the process of European legal integration as elaborated by Monica Claes and Bruno De Witte, one may summarize the overall approach of the ICC in the

In my article, I will firstly demonstrate that the long-standing refusal of the ICC to raise a preliminary reference is not to be deemed an illogical consequence of the dialogical attitude emerging from the *Granital* case, but rather the direct corollary of the peculiar pluralism enshrined in that decision. Far beyond the formal reasons referred to by the ICC in justifying that refusal, its crucial objective was that of shielding constitutional adjudication from interferences stemming from the CJEU. In this way, the integration model centered upon “coordination and separation” between EU and national law did not affect the autonomy of the ICC to establish the boundaries and the conditions of the relationship (B). In the second section of this article, I will examine the first preliminary reference raised by the ICC in 2008 in the renowned case concerning “luxury tax.” Despite the importance accorded to this decision, for the most part it must be considered to apply *Granital*, since its origin in a *principaliter* proceeding does not call into question the need for the ICC to be shielded against the displacement of the “right to the last word” to the alliance between the CJEU and the judiciary (C). In the third section, I will focus on the most recent preliminary reference raised by the ICC in 2013, concerning fixed-term workers in public schools. On first glance, this case could be depicted as the carrying out of the traditional attitude of the ICC *vis-à-vis* the CJEU, since the EU norms at stake were not deemed to have direct effect and were not, therefore, directly enforceable by judges. Against this background, my argument is that this case paves the way for a new era of relationships between the two Courts, in which the ICC dismisses the most conservative and defensive aspects of its case law (D), first of all those connected to the problem of dual preliminary and to the rigid alternative between direct and indirect effect (E). In reaching a new balance, the ICC seeks, however, a new way to avoid dismantling its systemic role of “last resort guardian.” Within this context, I argue that its peculiar role should be that of a conveyor of constitutionally sensitive issues at supranational level. In the final section, I will briefly sketch out the systemic consequence of this paradigm shift, both at internal and at supranational level. On the one hand, if the ICC is likely to inaugurate a phase of direct dialogue aimed at injecting constitutional blood at EU level, it should provide a clearer guidance of its action, for example by abandoning the most hostile traits of its case law concerning dual preliminary. On the other hand, the CJEU is called to encourage this attitude, by showing a peculiar responsiveness towards voices and reasons that seek to enlarge the constitutional foundations of EU law (F).

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following terms: extensive *facilitation* of the legal integration between Community law and domestic law, procedural *resistance* against a shift of ultimate judicial authority in internal law, and a minor direct *contribution* to the development of a common constitutional heritage for Europe. Monica Claes and Bruno De Witte, *The Role of National Constitutional Courts in the European Legal Space*, in *THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE* 77, 81 (Patricia Popelier, Armen Mazmanyan & Werner Vandenbruwaene eds., 2013).

**B. Form and Substance in Establishing Reluctance: *Granital* and Preliminary References**

If one tries to briefly outline the main judicial episodes in which the ICC has shown its reluctance towards the preliminary ruling procedure, it appears to be quite evident that the formal reasons adopted in the cases as to the ICC's unwillingness to enter into a direct dialogue are only a part of the story. At a deeper level, its refusal goes hand in hand with the basic theoretical mindset that has shaped the relationships between EU law and domestic law over the years.

*I. On Strategic Dualism*

As is well known, the current state-of-the-art of these relationships can be summarized by the doctrines enshrined in *Granital*, in which the ICC fully accepted the basic tenets of the *Simmenthal* case law of the CJEU, whilst at the same time offering a framework different to that of the monist one adopted by the CJEU in order to justify its acceptance of the basic principles enshrined therein. Unlike in its previous case law, on that occasion the ICC acknowledged a direct and prevailing effect of EU law and consequently accorded to the judiciary the possibility of directly setting aside conflicting domestic law, without needing to involve the ICC in order to declare it unconstitutional. The acceptance of the *Simmenthal* doctrine is, however, limited to the final outcomes of the relationship between national and supranational law, since the theoretical background of *Granital* is devoted to sharply contrasting the monist tenets of the CJEU in favor of a sort of "strategic dualism." Even if the ICC declared that, due to Article 11 of the Constitution,<sup>5</sup> EU law amounted to a directly enforceable law within the domestic legal order and prevailed over conflicting internal law, this was made possible by stating that the two legal orders were "autonomous and separated, even if coordinated according to the separation of competence established and guaranteed by the Treaty."<sup>6</sup> The autonomy of the two legal orders, in other words, is the key theoretical instrument that allows the ICC to let EU law "in" whilst ensuring that this is made possible by an autonomous choice of the Italian legal order. This sort of unease towards a strict compliance with the CJEU's doctrines is, moreover, demonstrated by the fact that, according to *Granital*, the internal act that conflicts with EU law is not properly set aside or disregarded (*disapplicato*), but rather *non-applied* (*non applicato*), that is, simply ignored by the judges. Though the difference may appear irrelevant or quite formalistic, the rationale behind this choice is to enforce a separation between legal orders, in that domestic law is not illegal as a consequence of a violation of EU law as a higher law, but as an autonomous choice of the Italian legal order to accord a prevalence to the latter over the former within the framework of a separation of competence. In the words of the rapporteur in *Granital*, Antonio La Pergola:

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<sup>5</sup> Article 11 reads, "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."

<sup>6</sup> Judgment No. 170/1984 at para. 4.

[t]he dualist rationale behind this result is that Italy has chosen to grant superiority to international law *by withdrawing its national law* ... Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal orders *chooses not to impede the application of Community law, not because Italian law is subordinate to Community law as maintained by the Court of Justice*.<sup>7</sup>

A similar commitment to strategic dualism is, moreover, evident when *Granital* traces the boundaries of its doctrine along the distinction between EU law provided with direct effect and not. While in the former case, the withdrawal of national law allows supranational law to be directly enforceable by judges, in the latter case the national rule maintains its validity and is therefore subject to review by the ICC, which is exclusively entitled to declare it as conflicting with Article 11 of the Constitution. This reinforces the “separate but coordinated” principle, since when non-directly enforceable EU law is at stake, the task of the judiciary is to involve primarily the ICC, that re-expands its role *vis-à-vis* supranational law. Within this kind of “separation of sovereignty,”<sup>8</sup> the distinction between direct and indirect effect is of utmost relevance, because it provides the main criterion that judges must rely on in order to convey their claims to the two different regimes (non-application or declaration of unconstitutionality) and therefore to the two Courts that are the ultimate guardians of those regimes (the CJEU and the ICC).

Against this background, one may ask whether this strategic dualism exerted an influence on the possibility of the ICC itself raising a preliminary reference. Before *Granital*, in the only case in which the ICC had been called on to raise such a reference, it refused to do so and delegated this task to the referring judge.<sup>9</sup> At first sight, this solution appeared extravagant, because following the decision of the CJEU, the ICC in the pre-*Granital* regime would have been called on to reexamine the case anyway.<sup>10</sup> Nevertheless, the solution

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<sup>7</sup> Antonio La Pergola and Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT’L L. 598, 614, 615 (1985) (emphasis added). The doctrinal roots of a similar judicial strategy must be seen in the pluralist theory of Santi Romano, whose seminal oeuvre L’ORDINAMENTO GIURIDICO 146 (1951, 1st ed. 1918) is devoted, among others objectives, to challenging the idea that relationships between legal orders are entirely shaped by the principle of exclusivity. In this light, coordination occurs as the outcome of the acceptance by one legal order of the rules adopted by another, that are acknowledged by the former not as a mere fact but in their proper legal relevance.

<sup>8</sup> La Pergola and Del Duca, *supra* note 7, at 615.

<sup>9</sup> Order 28. July 1976, No. 206.

<sup>10</sup> Marco Dani, *Tracking Judicial Dialogue—The Scope for Preliminary Rulings From the Italian Constitutional Court*, 16 MAASTRICHT J. EUR. & COMP. L. 149, 154 (2009).

provided in that case demonstrates that within that framework, the ICC was undoubtedly more directly involved with EU law and, paradoxically, even though supranational law was accorded a minor status, it was easier for the ICC to enter a direct dialogue with the CJEU.<sup>11</sup> On the contrary, with *Granital*, the task of dealing with EU law was for the most part delegated to common judges. This had the effect of indirectly displacing the ICC from its role of interlocutor with the CJEU. At a deeper level, from that moment on the difficulty for the ICC to raise a preliminary reference has been dramatized by the effort of the Court to expand the premises of the “separated but coordinated” principle from the sphere of the relationship between legal orders to the one involving the relationship between judicial actors. In other words, just as *Granital* hallows the self-limitation of national law when EU law is invoked, in the same vein the ICC decided autonomously to retire from the dialogue with the CJEU and to delegate this task to the judiciary. In doing so, while the judiciary was completely entrapped in the doctrines of primacy and direct effect developed by the CJEU, the role of the ICC remained shielded by the supremacy accorded to the Italian Constitution and to the reservation of sovereignty enshrined therein.<sup>12</sup>

## *II. Separation of Powers and De Facto Monism*

The founding rationale of *Granital* lies therefore in linking the normative status of EU law in the domestic legal order (which is fully consistent with the *Simmenthal* doctrine) with a delegation to the common judges of the task of managing the application of supranational law and references to the CJEU.<sup>13</sup> This accommodation led to a misplacement<sup>14</sup> of the ICC, since its action was increasingly detached from the application of EU law and from the chance of an interaction with the CJEU.<sup>15</sup> From the internal point of view, this solution is

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<sup>11</sup> Federico Sorrentino, *Svolta della Corte sul rinvio pregiudiziale: le decisioni 102 e 103 del 2008*, in 52 GIURISPRUDENZA COSTITUZIONALE 1288, 1289 (2008).

<sup>12</sup> Enzo Cannizzaro, *Rinvio pregiudiziale e Corti costituzionali nazionali*, in SCRITTI IN ONORE DI GIUSEPPE TESAURO, 819, 822 (2d vol. 2014). On a similar dialectic between primacy and supremacy, see Giuseppe Martinico & Federico Fontanelli, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, 16 EUR. L. J. 345, 349 (2010).

<sup>13</sup> In so doing, the ICC took into account the need to integrate in the same theoretical setting what Joël Rideau, *Les garanties juridictionnelles des droits fondamentaux dans l'Union Européenne*, in L'UNION EUROPÉENNE ET LES DROITS FONDAMENTAUX 75, 91 (Stéphane Leclerc, Jean-François Akandji-Kombé & Marie-Joëlle Redor eds., 1999), defined as “*hiérarchies normatives*” and “*hiérarchies institutionnelles*”.

<sup>14</sup> One of the earliest and most insightful accounts of this misplacement has been made by Sergio Panunzio, *I diritti fondamentali e le Corti in Europa*, in I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA 3, 23 (Sergio Panunzio ed., 2005).

<sup>15</sup> An insightful critique of a similar misplacement can be found in Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 EUR. CONST. L. REV. 5, 25 (2009).

perfectly consistent with a pluralist approach that works “under shifting *grundnorms*,”<sup>16</sup> since the full acceptance of direct effect and *primauté* at internal level coexists with the preservation of the autonomous role of the ICC, which entails the safeguarding of a sphere of constitutional identity and not the application of EU law. As in the words of the former President of the ICC, Valerio Onida: “to each one his own job.”<sup>17</sup>

One may argue that a similar outcome, if assumed in general, was not inevitable. As has been previously highlighted, the ICC remained formally entitled to decide and to give effect to Community law in those cases where not directly enforceable EU law was at stake. But on several occasions, the ICC decided simply “not to decide” these cases, either because domestic law was not deemed to conflict with supranational law<sup>18</sup> or because the task of raising a preliminary reference was anyway shifted to common judges. If priority had been given to the referral of constitutionality—so argued the ICC<sup>19</sup>—the decision of the ICC risked being unnecessary because the CJEU was entitled to proffer subsequently a different interpretation that was binding for the referring judge.<sup>20</sup>

The capacity of the strategic rationale of *Granital* to expand its premises is even more evident if one considers that whenever the CJEU was involved by judges in cases concerning EU law *without* direct effect, its judgment could in any case be enforced by the referring judge. According to the case law of the ICC,<sup>21</sup> the CJEU’s decisions must be accorded direct effect, so that at the end of a preliminary ruling procedure the referring judge is entitled to give it effect without needing to further involve the ICC (which, if anything, would declare the referral inadmissible, as in every other case concerning directly applicable EC law). The distinction between direct and indirect effect, though formally effective, appeared therefore to be quite fictitious in grasping the exceptions to the *Granital* doctrine, since even in these cases the common judges were called to apply EU law and to enter into a dialogue with the CJEU. The combination of these jurisprudential strains, a mix of judicial isolationism and commitment to legal integration,

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<sup>16</sup> Daniel Sarmiento, *The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU law*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 285, 289 (Matej Avbelj & Jan Komárek eds., 2012).

<sup>17</sup> Valerio Onida, «*Armonia tra diversi*» e *problemi aperti. La giurisprudenza costituzionale tra ordinamento interno e ordinamento comunitario*, 22 QUADERNI COSTITUZIONALI 549, 551 (2002).

<sup>18</sup> Order 23. June 1999, No. 267.

<sup>19</sup> Orders 29. December 1995, No. 536; 26. July 1996, No. 319; 18. April 2008, Nos. 108 and 109.

<sup>20</sup> According to the rules regulating the procedure before the ICC, an order of referral raised by a judge is admissible insofar as the decision of the ICC is necessary in order to define the case pending before it (*criterio della rilevanza*).

<sup>21</sup> Judgment 23. April 1985, No. 113 and judgment 11 July 1989, No. 389.

increased the misplacement of the ICC and left the core of the judicial dialogue to the alliance between the CJEU and the common judges.

Besides this, the only real *Granital* free area is that concerning *principaliter* rulings, raised by State and Regions in cases of conflicts concerning the exercise of legislative competences. In these proceedings, as will be further shown, the ICC operates as the only judge, so that nobody else can be delegated the responsibility of giving full effect to supranational law and, consequently, of raising a preliminary reference to the CJEU. Despite this, until 2008 the ICC decided on several occasions to declare internal legislative provisions which conflicted with the EU Treaties as void,<sup>22</sup> but never referred to the CJEU.

Apart from *principaliter* rulings, the basic tenets of the “separated but coordinated” principle, first of all the divergence in the relationships between legal orders and those among judicial actors, represent the theoretical framework within which the question of the preliminary reference by the ICC should be grasped. As we will see in the next part, the reasons given over the years to justify its reluctance are nothing but a plain corollary of the stance taken in 1984.

### *III. Preliminary References and “Definitional Struggles”*

Given the need to reinforce a separation of powers between the CJEU and the ICC and in light of the delegation of the task to refer to the judiciary, the explicit refusal of the ICC to raise a preliminary reference should come as little surprise. Following the precedent set by Case No. 206/1976,<sup>23</sup> the ICC eluded the issue for a second time in 1991<sup>24</sup> when, in rather abstract terms, it stated that the establishment of the direct effect of an EC Directive could be ascertained by the CJEU upon referral of the judge or, alternatively, of the same ICC. Despite this potential opening, this precedent has remained isolated, since the ICC has never used this possibility.

In subsequent decisions, the ICC clearly formulated the terms of its refusal to be engaged in a dialogue with the CJEU, by stating that its role is strictly linked to a function of constitutional control and of supreme guarantor of the allegiance to the Constitution by the constitutional organs of the State and of the Regions, so that it cannot be considered to be a national judicial authority in the terms of the then Article 177 TEC (currently Article 267 TFEU).<sup>25</sup> Although the argument based on the non-judicial nature of the function

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<sup>22</sup> Judgments 10. November 1994, No. 384; 30. March 1995, No. 94; 13. January 2004, No. 7; 28. March 2006, No. 129.

<sup>23</sup> Order 28. July 1976, No. 206.

<sup>24</sup> Judgment 18. April 1991, No. 168.

<sup>25</sup> See, *inter alia*, orders 29. December 1995, No. 536; 26. July 1996, No. 319.



exercised by the ICC has since played a key role in justifying the reluctance of the Court, it has always appeared as a mere *façade* hiding the institutional balance displayed by the “strategic dualism” solution.<sup>26</sup> Much more than a similar definitional struggle, what is worth highlighting is the set of judicial arguments used by the ICC to further enhance the shield mentioned above, which has aimed to prevent direct contact with the CJEU’s decisions.

On the one hand, the ICC has declared inadmissible those judicial referrals affected by dual preliminary, both when the judge decided not to refer to the CJEU before addressing its claim to the Constitutional Court, and when the judge decided to contemporarily raise two referring orders to the CJEU and to the ICC. In the same vein, the ICC on several occasions<sup>27</sup> gave the file back to the referring judge (*restituzione degli atti*) because a subsequent judgment of the CJEU made it necessary for him to evaluate whether the claim was still necessary.

All these arguments have been widely criticized by many legal scholars because of their inconsistency with some basic assumptions that regulate both the role of the ICC at internal level and the relationships between supranational and domestic law.<sup>28</sup> It suffices here to recall that the status of “court or tribunal of a Member State” is an autonomous notion of EU law that cannot be self-standingly defined by national legal orders. Moreover, one may add that the general prohibition of dual preliminary does not take into account the fact that the two questions can arise independently from each other, so that the decision of the constitutional adjudicator is not necessarily destined to possible conflict with the one adopted by the CJEU (and *vice versa*).<sup>29</sup>

For all these reasons, it should be clear why I decided to define the arguments used by the ICC in order to pinpoint its refusal as nothing more than “definitional struggles.” They each appear to be largely incapable of providing a sound justification for the isolationist view

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<sup>26</sup> Not to mention the legal flaw of a similar stance, given that the ICC previously qualified itself as a “judge” in order to raise a constitutional referral before itself. Tania Groppi, *La Corte costituzionale come giudice del rinvio ai sensi dell’art. 177 del trattato CE*, in GIUDICI E GIURISDIZIONI NELLA GIURISPRUDENZA DELLA CORTE COSTITUZIONALE 171, 187 (Pietro Carlo, Giovanni Pitruzzella & Rolando Tarchi eds., 1997).

<sup>27</sup> Orders 14. March 2003, No. 62; 20. April 2004, No. 125; 24. February 2006, No. 70.

<sup>28</sup> An extensive account of these critical stances can be found in Marta Cartabia, *La Corte costituzionale italiana e il rinvio pregiudiziale alla Corte di giustizia europea*, in LE CORTI DELL’INTEGRAZIONE EUROPEA E LA CORTE COSTITUZIONALE ITALIANA 99, 107 (Nicolò Zanon & Valerio Onida eds., 2006).

<sup>29</sup> AUGUSTO CERRI, CORSO DI GIUSTIZIA COSTITUZIONALE PLURALE 181 (2012). In a similar vein, see Marta Cartabia, *Considerazioni sulla posizione del giudice comune di fronte a casi di «doppia pregiudizialità» comunitaria e costituzionale*, 120 II FORO ITALIANO 222, 224 (1997). On dual preliminary as a more general problem concerning multiple loyalties of judges in multilevel contexts, see Giuseppe Martinico, *Multiple loyalties and dual preliminary: The pains of being a judge in a multilevel legal order*, 10 I-CON 871 (2012).

purported by the ICC. Taken as a whole and considered from the theoretical standpoint elaborated by the ICC, they appear for what they are: corollaries of a more general precommitment towards a separatist attitude established by the ICC in order to find a balance between the normative bounds deployed by EU law on the domestic legal order and the institutional autonomy that the ICC carved out *vis-à-vis* the CJEU.<sup>30</sup>

Two cases decided by the ICC in 2002 and 2004 provide a useful example of both problems raised by this approach for the effectiveness of judicial protection and the underlying implications for the relationships between domestic and EU law.

The first case is the prequel of the well-known *Pupino* saga, decided by the ICC in 2002.<sup>31</sup> The referral order raised by the *Tribunale di Firenze* sought to extend the application of the “special inquiry procedure” for young children regulated by Article 398 of the Code of Criminal Procedure with regard to offences other than sexual crimes. In its decision, the ICC dismissed the claim by stating that the provision at stake was to be considered *lex specialis* and therefore could not be extended to similar situations. What matters, in this decision, is that the ICC in substance ignored the argument put forward by the referring judge, according to which the extensive interpretation was supported by a Framework decision,<sup>32</sup> though lacking direct effect, that required the introduction of similar inquiry proceedings when vulnerable subjects were involved in a criminal case. The rest of the story is well known and does not need to be analyzed in detail.<sup>33</sup> The decision of the CJEU,<sup>34</sup> while extending the notion and the consequences of the direct effect doctrine to the Third Pillar and to Framework decisions, in a certain way confirmed the impossibility of extending the special procedure in the case at stake, since the consistent interpretation of national law could not be pursued *contra legem*. The point, as highlighted by Marco Dani, is that the refusal of the ICC to deal with the effects of the Framework decision by lodging a preliminary reference to the CJEU leaves the common judge without a clear yardstick for the decision. While the ICC justified the narrower interpretation of the procedural rules, it did not state that the interpretation endorsed by the CJEU was unconstitutional, with the consequence that it was not clear whether the extensive interpretation had to be considered *contra legem*: “[a] similar uncertainty could have probably been avoided had

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<sup>30</sup> The intertwining of these two aspects has been highlighted by Cartabia, *supra* note 15, at 115 and Dani, *supra* note 10, at 157–58.

<sup>31</sup> Judgment 18. December 2002, No. 529.

<sup>32</sup> EU Framework decision 2001/220 of 15 March 2001, O.J. 2001 L 82/1.

<sup>33</sup> See Eleanor Spaventa, *Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino*, 3 EuCONST 5 (2007).

<sup>34</sup> Case 105/03, Criminal proceedings against Maria Pupino, 2005 E.C.R. I–5285, para. 47.

the Constitutional court referred the case to the Court of Justice, a wise solution that the former apparently did not consider.”<sup>35</sup>

The second case concerned the criminal norms that mitigated the punishment for the offence of false accounting (*falso in bilancio*). Several judges turned alternatively to the ICC and to the CJEU and claimed that the norms at stake conflicted both with the Constitution and with an EC Directive that required adequate sanctions for similar offences.<sup>36</sup> Before the ICC, the claim was raised as to whether the challenged legislation conflicted with Articles 11 and 117(1)<sup>37</sup> of the Constitution, due to its inconsistency with the Directive in question. Whilst the ICC simply updated the question without taking a decision on the merits,<sup>38</sup> the CJEU stated that the challenged legislation was not consistent with the aims pursued by the Directive, but that the application of this could not have the effect of increasing the criminal liability in the specific case, due to the principle of the retroactive application of the more lenient penalty.<sup>39</sup> As in *Pupino*, and given the persisting refusal of the ICC to decide the case pending before it, the difficulty of the CJEU in providing a viable answer to the referring judges could have been balanced (if not eliminated) by a major involvement of the ICC, that could have conveyed constitutional arguments aimed at resolving the *impasse* that the judges had to face in both cases.<sup>40</sup>

### C. The 2008 “Luxury Tax” Case: Upheaval in Continuity?

The reluctance of the ICC has for the most part relied upon technical considerations aimed at justifying a separation of powers with the CJEU; it has rarely taken into account substantive reasons that could have pushed it to set before the CJEU a set of constitutional arguments capable of conveying a distinct internal constitutional perspective (as it should have been for both the *Pupino* and the *Berlusconi* cases).

In the light of the critiques addressed to this case-law, it could appear inevitable that the ICC was led over time to rethink the premises of its isolationism—an isolationism that increasingly revealed itself to be ineffective in the face of the growing *de facto* monism that the same ICC had upheld since the end of the 1980s.

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<sup>35</sup> Dani, *supra* note 10, at 157.

<sup>36</sup> EEC Directive 68/151 of 9 March 1968, O.J. L 65.

<sup>37</sup> Art. 117(1) reads, “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.”

<sup>38</sup> Order 1. June 2004, No. 165.

<sup>39</sup> Joined Cases C–387/02, C–391/02, and C–403/02, Silvio Berlusconi, 2005 E.C.R. I–3565, para. 75.

<sup>40</sup> The exemplarity of the *Berlusconi* saga is thoroughly investigated by Cartabia, *supra* note 28, at 110.

A similar rethinking occurred in a quite routinely *principaliter* proceeding activated in 2008, when the State government challenged a series of fiscal measures adopted by the Sardinia Region in order to reform its tourism policy. In particular, a regional law of 2007 created taxes on capital gains accruing from the transfer of holiday homes, fees in the landing of aircrafts and mooring of sports boats, and a general tourist tax. Among the different standards of review, the State government complained that the tax on planes and boats (the only one that raised problems of compatibility with EU law) conflicted with Article 117(1) of the Constitution in relation to Article 12 TEC (the prohibition of discrimination on grounds of nationality), Article 49 TEC (freedom to provide services), and Article 87 TEC (the prohibition of state aids). The core of the case involved the heavier burden posed by these measures on providers not resident in Sardinia and, consequently, the indirect advantage of local suppliers of tourism services. An in-depth analysis of the general legal background of the case is not necessary here.<sup>41</sup> What is worth highlighting, however, is that the ICC adopted a twofold approach in dealing with the claims. On the one hand, it reiterated the basic assumptions governing the relationships between supranational and internal law as far as the preliminary reference procedure is concerned, and, on the other hand, it highlighted the difficulty of dealing with the case at stake as it had done in the past, when it had stated that the absence of doubts as to the application of the relevant EU law made a reference to the CJEU unnecessary (pursuant to the *acte claire* and to the *acte éclairé* doctrines).

In relation to the first set of arguments, the judgment No. 102/2008 reaffirms the differences between *incidenter* and *principaliter* proceedings.<sup>42</sup> Only in the former is the duty to give full effect to EU law demanded of the common judge, who is consequently entitled to lodge a preliminary reference with the CJEU. In *principaliter* cases, quite on the contrary, the absence of a judge shifts to the Constitutional Court the duty to transform the question of compatibility of internal law with EU law into a question of constitutionality, through the medium of Article 117(1) of the Constitution. In the words of the judgment:

In cases in which the Constitutional Court is seized directly [...], the assessment of the conformity of the regional law with Community legislation occurs, by way of Article 117(1) of the Constitution, in constitutional proceedings, and accordingly where it is found to be incompatible, the court does not set aside the law,

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<sup>41</sup> See Fontanelli & Martinico, *supra* note 12, at 350.

<sup>42</sup> Judgment 15. April 2008, No. 102, para. 8.2.8.1. (official translation available at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S2008102\\_Bile\\_Gallo\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2008102_Bile_Gallo_en.pdf)).

but—as noted above—declares it unconstitutional *erga omnes*.<sup>43</sup>

These arguments are not deemed to be a novelty in the case law of the ICC, given that the reference to Article 117 is not meant to make any valuable difference in respect of what is enshrined in Article 11. In fact, the apparently major involvement in EU law issues does not exclude that the judgment is in line with the main corollaries mentioned before, such as the general prohibition on dual preliminary.<sup>44</sup>

With the second set of arguments, the ICC reveals its unease with a solution that simply replicates its previous case law in terms of reliance on the *acte claire* doctrine. The need to provide an answer, which the ICC on this occasion does not hold to be self-evident, leads it to lodge a preliminary reference with the CJEU in relation to the conflicts with Articles 49 and 87 TEC.<sup>45</sup> On these premises, the ICC states that in *principaliter* proceedings, its position can be fully equated with that of every referring judge, since its nature, despite its peculiar role, is judicial and, moreover, because in these proceedings it is the *only* judge able to solve the case.

Against this background, it seems necessary to assess whether this precedent can be considered as a breakthrough with respect to the doctrines of “strategic dualism” or whether it is rather to be understood as a peculiar enhancement of that theoretical baseline. Some points of the decisions at stake represent an undoubted novelty, like when the ICC gets rid of every definitional taboo about its judicial nature.<sup>46</sup> Even more importantly, it is crucial to highlight the attention shown in this case towards the need for the CJEU (and not the ICC) to assess the discriminatory nature of the contested taxes. This second element in particular demonstrates that the decision to refer breaks with the most blatant premises of strategic dualism. On the other hand, it is plain to see that the ICC emphasizes the continuity with its precedents, because, as I highlighted before, *principaliter* proceedings have traditionally been the only *Granital*-free area in relation to the procedural relationship with the CJEU.

In the end, one might say that the meaning of the luxury tax case by itself is not particularly innovative, because the ICC does its best to link the novelties with the

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<sup>43</sup> Judgment No. 102/2008 (note 43), para. 8.2.8.1.

<sup>44</sup> “[...]where the ordinary courts question the compatibility of national law with EC law, the failure to make a preliminary reference to the European Court of Justice means that any question of constitutionality raised by it is not relevant and therefore inadmissible.” See *id.*

<sup>45</sup> Order 15. April 2008, No. 103 (official translation [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/O2008103\\_Bile\\_Gallo\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O2008103_Bile_Gallo_en.pdf)).

<sup>46</sup> Sergio Bartole, *Pregiudiziale comunitaria e «integrazione» di ordinamenti*, 36 LE REGIONI 898, 900 (2008).

coherent development of what was included in the *Granital* doctrine.<sup>47</sup> On further analysis, however, the impression is that of a tentative message, a sort of *ballond'essai* directed at both national and (mainly) supranational interlocutors (the CJEU in particular), that announces the dawn of a new era of mutual relationship and, alongside this, an in-depth rethinking by the ICC of the most strict isolationist premises of its action *vis-à-vis* supranational law.<sup>48</sup> To become reality, however, this message needed to be further developed and its basic premises clarified.

#### D. The “Fixed-Term Workers” Case and the Quest for Constitutional Sensitivity

After 2008, the absence of further preliminary references by the ICC has led many scholars to believe that that episode had to remain isolated and its rationale confined to the less relevant area of *principaliter* judgments. If so, it would have been forceful to consider that the long-run effects of the 2008 precedent had to be grasped within a strain of continuity with the traditional mindset of the ICC's case law.

However, what seemed hardly possible became reality in 2013, when the ICC<sup>49</sup> lodged for the second time ever a preliminary interpretive reference with the CJEU, and this time in the framework of an *incidenter* proceeding. The case concerned the terms of employment of fixed-term workers in public schools. The circumstances of the case are worth highlighting, since they shed light on the overall approach of the ICC and on the doubts as to whether this case is another application of well-established principles or, on the contrary (as I argue), it represents the beginning of an unprecedented way of dealing with EU law and with the CJEU in particular.

The referral orders concerned the constitutionality of Article 4(1) and (11) of Law no. 124 of 3 May 1999 (*Urgent provisions on school staff*) and were raised by the *Tribunale di Roma* and by the *Tribunale di Lamezia Terme* with reference to Article 117(1) of the Constitution, as related to Clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work, annexed to Council Directive no. 1999/70/EC of 28 June 1999.<sup>50</sup>

The applicants in the main proceedings were teachers and administrative staff who worked in different schools under the terms of numerous successive fixed-term contracts. They claimed that the internal legislation was unconstitutional on the grounds that a similar

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<sup>47</sup> “The overruling should not be overemphasized.” Cartabia, *supra* note 15, at 24.

<sup>48</sup> Bartole, *supra* note 46, at 902.

<sup>49</sup> Order 18. July 2013, No. 207 (official translation [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/207-2013.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/207-2013.pdf)).

<sup>50</sup> Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. L 175/43.

system of limitless substitute teaching (*supplenze*) conflicted with Directive 1999/70 in that this sought to prevent and punish the abuse of such contracts and called on States to set time limits and a right to damages in case of violation. Since 2001, in Italian law this time limit amounts to a maximum of thirty-six months and, after this period, in the public sector the work contract cannot be converted into a permanent one, but the worker is entitled to payment of damages. Within the public sector, the school is the only exception to this rule, and according to the challenged norms fixed-term workers that are employed for more than thirty-six months cannot benefit from any compensatory damages either. The constitutional justification for these limitations lies in the fact that, while according to Article 97 of the Constitution public workers can be employed exclusively after an administrative competition (and not as a consequence of a conversion of a contract), in public schools in particular the more restrictive regime reflects the need to adapt the education service over time to the constantly changing student population. Only this adaptive and flexible recruiting system, so the ICC argued, can guarantee a qualitatively and quantitatively adequate level of education, enabling full enjoyment of the right to education (Article 34 of the Constitution).

On first glance, the key element of the case is the fact that Directive 1999/70 lacks any direct effect.<sup>51</sup> As I earlier recalled, whenever the ICC is called upon to decide on cases concerning EU norms without direct effect, its ability to rule on the case and, eventually, to refer to the CJEU is not theoretically in question. Despite this, on several occasions the ICC dismissed similar claims by stating that the interpretive doubts as to EU law should be conveyed to the CJEU by the ordinary judges; it did this even in recent cases in which the direct nature of the EU provisions at stake needed to be further ascertained.<sup>52</sup> In all these cases, the rather abstract competence of the ICC to deal with supranational law remained entangled by a sort of “dual preliminary trap” that pushed the ICC to overemphasize the procedural rules regulating its action<sup>53</sup> rather than its duty to give effect to EU law when judges are not entitled to directly enforce it. What the ICC constantly reaffirmed in the past is, however, evidently absent on this occasion, since the ICC refuses to delegate to the referring judge the task of making a preliminary reference and accepts being engaged in a conversation with the CJEU in which it justifies, in light of internal constitutional law, the legislative choices concerning the organization of public schools.<sup>54</sup>

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<sup>51</sup> Barbara Guastaferrò, *La Corte costituzionale ed il primo rinvio pregiudiziale in un giudizio di legittimità costituzionale in via incidentale: riflessioni sull'ordinanza n. 207 del 2013*, FORUM DI QUADERNI COSTITUZIONALI 1, 7 (Oct. 21, 2013), available at [www.forumcostituzionale.it](http://www.forumcostituzionale.it)).

<sup>52</sup> Order 17. December 2008, Nos. 415 and 2. April 2009, No. 100.

<sup>53</sup> See *supra* note 20.

<sup>54</sup> The outcome is even more striking if one highlights that, with a judgment issued in 2012 (No. 10127 of 20 June 2012) the Italian Court of Cassation stated that the norms at stake did not have to be challenged before the CJEU because of its univocal case law on this matter. See O. Pollicino, *From Partial to Full Dialogue with Luxembourg: the Last Cooperative Step of the Italian Constitutional Court*, 10 EUCONST 151 (2014).

The ambivalent terms of the “luxury tax” precedent become clearer in this case, since the uncertainties surrounding that reasoning and the doubts as to its generalization were swept away when the ICC placidly overruled case law that had stood for thirty years and stated that “it must be concluded that this Court also has the status of a ‘court or tribunal’ within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union within proceedings in which it has been seized on an interlocutory basis.”<sup>55</sup>

Alongside the question of the formal reasons handed down in the referring order, the question arises of why there was such a judicial breakthrough. The triggering factor seems to be strictly linked to substantive reasons that entail both the constitutionally sensitive area in which the ICC had to decide and the quest for a “qualified” interaction with the CJEU.<sup>56</sup> As to the former, the ICC aims at demonstrating that a plain application of the Directive 1999/70 conflicts with the basic constitutional principles regulating the right to education and the need for administrative competition for public workers. In this light, the core of the case can be summarized in the second question raised by the ICC, when the CJEU is asked to assess whether the

organi[z]ational requirements of the Italian school system as set out above constitute objective reasons within the meaning of clause 5(1) of Directive no. 1999/70/EC of 28 June 1999 thereby rendering compatible with EU law legislation such as Italian law which does not provide for a right for damages in relation to the hiring of fixed-term school staff.<sup>57</sup>

In the constitutionally sensitive nature of the case is thus to be seen the reason that led the ICC not to declare inadmissible the order raised by the referring judges, but rather to share those doubts and to further qualify them in constitutional language.<sup>58</sup>

This explains why, for the ICC, it is necessary that a particularly “qualified” view supporting internal law is conveyed before the CJEU. While in ordinary cases the common judges are best suited to guarantee the full and uniform application of EU law, when constitutional

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<sup>55</sup> Order No. 207/2013.

<sup>56</sup> Cannizzaro, *supra* note 12, at 827 (arguing that this need for a justification can be qualified in terms of “active cooperation”).

<sup>57</sup> Order no. 207/2013.

<sup>58</sup> A similar opinion is shared by Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ('Incident') Proceeding*, 20 EUR. PUB. L. (2014), 641.



issues are at stake it is up to its guardian to make the case, since in doing this its role is irreplaceable. Although this stance is not directly purported in the case, it can be assumed to emerge in one of the most debated points of the order, where the “last resort” nature of the jurisdiction of the ICC is called into question with reference to Article 267(3) TFEU. In the “luxury tax” case, the assimilation of the ICC to a last resort judicial authority was justified by the fact that in *principaliter* proceedings, the ICC is not only the *higher* judge to deal with the case, but more simply the *only* one, since common judges do not enter the scene there. Moreover, a similar conclusion relied upon the fact that, according to Article 137 of the Constitution, “[n]o appeals are allowed against the decision of the Constitutional Court.” If the latter argument remains true even for *incidenter* rulings, it is much more questionable to assume that in these cases the ICC is either the higher or the only judge to deal with the case. Despite this, in 2013, the ICC, as in 2008, plainly assumed that its jurisdiction is that of a last resort judge in terms of Article 267(3) TFEU, and that it is therefore subject, like every other last resort judge, to a duty to refer to the CJEU. The imposition upon the ICC of a similar duty to refer must, however, not be overstated. Unlike last instance common judges, the ICC has an intrinsically wider leeway when evaluating whether a claim must be referred to the CJEU, and this derives from the *sui generis* nature of its jurisdiction, that is still aimed at safeguarding the basic systemic conditions of the “separated but coordinated” principle. In other words, it must be assumed that the ICC is in a preferred position to assess whether it has a duty or not to refer. On the one hand, this is because, *de facto*, it still freely sets the terms of its engagement with the CJEU, as, for example, when it recalls the doctrines of *acte claire* and *acte éclairé*,<sup>59</sup> or when it recently argued that a preliminary reference can only be raised when it is called to decide on the basis of the constitutional parameters of Article 11 and 117(1) of the Constitution,<sup>60</sup> or, lastly, when it offers an autonomous interpretation of EU law.<sup>61</sup> On the other hand, it is important to consider that the overcoming of the most blatantly isolationist premises of its previous case law has not led the ICC to an unhindered acceptance of the judicial monism that basically equalizes every judicial authority under the CJEU. In so doing, the ICC could maintain the last word on its commitment towards EU law while at the same time safeguarding a pluralistic setting for judicial relationships.<sup>62</sup>

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<sup>59</sup> Judgments 23. December 2008, No. 439; 21. January 2010, No. 16; 16. October 2014, No. 235.

<sup>60</sup> Judgment 31. March 2015, No. 56.

<sup>61</sup> Judgment 7. July 2015, No. 130.

<sup>62</sup> For a partially different stance, according to which in this case the ICC has accepted to be engaged in a “full dialogue” with the CJEU. See Pollicino, *supra* note 54, at 153.

### E. Dual Preliminarity and Direct Effect Revisited

If the ICC has been able to pour new meanings into the old framework regulating its relationships with the CJEU, this did not occur as a breakthrough but rather thanks to a learned and cautious rethinking of two governing doctrinal tools that it largely used until now: dual preliminarity and the doctrine of direct effect. I will examine the transformations affecting these doctrines in the following parts of the article, reserving the analysis of their long-term effects to the final considerations.

#### *I. Dual Preliminarity in Constitutionally Sensitive Claims*

Although the ICC has regularly inhibited common judges from raising preliminary references to the CJEU after or at the same time as a constitutional referral in indirect (*incidenter*) proceedings, signals of a possible revirement arrived shortly before the order no. 207/2013.<sup>63</sup> An example is the mentioned order no. 165/2004,<sup>64</sup> when the ICC simply updated the question without declaring it inadmissible, or the judgment No. 94/2013,<sup>65</sup> where, according to Augusto Cerri, the ICC signaled a certain unease with its established case law.<sup>66</sup> These episodes reveal the growing need for the ICC to rethink the absoluteness of its ban on dual preliminarity, at least in terms of separating the claims where supranational and internal (constitutional) claims are strongly intertwined (so-called 'strong alternative') from those where, on the contrary, the two profiles are basically independent from each other (weak alternative).<sup>67</sup> While in the latter case the ICC could righteously uphold its previous approach, in the former it should allow the common judge to refer its doubts with more procedural ease to the two Courts.

In the "fixed-term workers" case, the ICC dealt with a different situation. Although the internal and the supranational profiles regarding the legislation on school personnel are strongly enmeshed, the need for the ICC to turn to the CJEU derived from the urgent need to provide a constitutional justification for the challenged measures. In this light, it must be emphasized that the same internal norms have been challenged before the CJEU, though in a different perspective, by the *Tribunale di Napoli*.<sup>68</sup> At a deeper sight, the fact that some judges decided to turn to the ICC and others to the CJEU must not be linked to a mere divergence regarding the circumstances of the case or the nature (direct/indirect) of

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<sup>63</sup> See *supra* note 50.

<sup>64</sup> See *supra* note 38.

<sup>65</sup> Judgment 22. May 2013, No. 94.

<sup>66</sup> Augusto Cerri, *La doppia pregiudiziale in una innovativa decisione della Corte*, 57 GC 2897, 2898 (2013).

<sup>67</sup> *Id.* at 2900; Onida, *supra* note 17, at 557.

<sup>68</sup> Decisions of 2, 15, and 29 January 2013.

the EU law in question. This fact reflects, on the contrary, a systemic necessity which is strongly linked to the different roles of the ICC and the common judges whenever they are called to give effect to EU law lacking direct effect. On the one hand, the latter seek a continuity between internal and EU law since their action is more directly embedded in the circumstances of the case, so that they claim first and foremost the uniform application of supranational law (first-order justification). On the other hand, the former deals with the need to provide a justification for the choices adopted by internal law, moving from a perspective that is systemic because: a) in substance, it places (constitutional) national and EU law on an equal footing, and b) it basically ignores the concrete circumstances of individual applicants (second-order of justification).<sup>69</sup>

If this is the case, it is inevitably necessary to analyze finally whether a similar outcome could occur even with regard to EU law *with* direct effect. If no one can doubt that here the basic premises of the *Granital* doctrine remain unchallenged and thus the preliminary reference can be raised only by common judges (with the exception of counter-limits cases), what if a similar need of qualified interaction emerges even in these cases? Are the substantive reasons underpinning a constitutional choice sufficiently and adequately conveyed to the CJEU by common judges, even if they do not endanger a severe constitutional momentum (as in the case of *counter limits*)? Even if one may have doubts as to whether this setting will remain unchallenged in the future, it is hard to provide an answer. Whereas the ICC is unlikely to abruptly reverse its overall approach on this point in the next future, major changes could come from a rethinking of apparently technical or minor issues: the divide between direct and indirect effect could be one of those.<sup>70</sup>

## *II. Direct Effect: Beyond Van Gend En Loos?*

As has been highlighted, direct effect has been the pivotal doctrinal tool that the ICC has relied upon in order to set a clear-cut distinction between its functions *vis-à-vis* EU law and the powers delegated to the common judges. The fixed-term workers case called this distinction into question, because it was left in the background while the quest for a substantive interaction was privileged. From a more general perspective, this rethinking coincides with an overall reshaping of the doctrine of direct effect at supranational level, so that a sort of variable reliance on it at internal level can find further justifications in the near future.

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<sup>69</sup> The difference between first order and second order of justification is drawn by NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 99 (1994).

<sup>70</sup> In a similar vein, Cartabia, *supra* note 15, at 29, argued that “[d]octrines like direct and indirect effect could easily be interpreted so as to involve also the supreme and constitutional courts, instead of banning them.”

The classical stance of *Granital* went hand in hand with the basic premises of the doctrine emerging from *Van Gend en Loos*,<sup>71</sup> according to which direct effect was nothing more than the intrinsic *nature* of an EU norm, whose ascertainment was to be deemed as the inquiry on a matter of *fact*. The expansion of EU competences, the growing interconnections between national and supranational judicial actors, the *montée en puissance* of consistent interpretation, the process of constitutionalization of the EU and the entry into force of the Charter of Fundamental Rights have progressively altered such a paradigm, that was for the main part grounded on the objective nature of Community law norms<sup>72</sup> and on a simplified interaction between judicial actors (the *post-Simmenthal* paradigm). More recent analysis show that the rationale of the doctrine of direct effect is shifting from a (supposed or real) clear-cut legal ontology to the convergence of multiple and variable factors, such as: a) the concurrence of variable norms stemming from different sources (OMC, soft law, general principles, and so on), whose direct effect appears as the outcome of a process of interpretive combination rather than selection; b) the expansion of its role beyond the State-individual (vertical) relationship and the connected capacity to impose burdens and duties on individuals (horizontal direct effect); c) the entry into force of the Charter of Fundamental Rights, which imposes on the CJEU the duty to assess whether national courts can enforce the same Charter rights as are enshrined in national constitutions.<sup>73</sup>

Against a similar background, it is possible to argue that the decreasing reliance on the distinction between direct and indirect effect in the case law of the ICC is not only an episode, but more probably the assessment of a changing paradigm in the relationships between domestic and EU law, whose main focus, as far as the role of Constitutional Courts is concerned, regards the contribution and the place of fundamental rights in the European legal landscape.<sup>74</sup> If it is unquestionable that they represent the most important domain “in which EU law effectiveness is challenged, these days, in relation with the issue of applicability of EU and national law,”<sup>75</sup> a growing activism of Constitutional Courts seems inevitable in the light of the competing interaction between judicial actors.

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<sup>71</sup> One might see in this the acceptance by the ICC of the systemic combination of direct effect and preliminary reference as it has been emphasized by Joseph H.H. Weiler, *Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy*, 12 I-CON 94, 95 (2014).

<sup>72</sup> Sacha Prechal, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in *THE FUNDAMENTALS OF EU LAW REVISITED: ASSESSING THE IMPACT OF THE CONSTITUTIONAL DEBATE* 35, 36 (Catherine Barnard ed., 2007).

<sup>73</sup> These transformations involving the doctrine of direct effect are deeply analyzed by Sophie Olivier-Robin, *The evolution of direct effect in the EU: Stocktaking, problems, projections*, 12 I-CON 165 (2014).

<sup>74</sup> In this (slightly different) perspective, I share the assumption of Dani, *supra* note 9, at 169, according to which “[a]s long as the EU judicial architecture will maintain its current post-*Simmenthal* structure, the task of conveying constitutional traditions to Luxembourg cannot but rest with ordinary courts.”

<sup>75</sup> Olivier-Robin, *supra* note 73, at 185.

As far as the ICC is concerned, the relativization of that distinction calls into question a further problem that involves the persistent sustainability of the rationale of *Granital*. In other words, behind the solution given to the “fixed-term workers” case, a potential contradiction is to be grasped: while the clear-cut distinction between direct and indirect effect of EU law is increasingly being blurred, the most defensive premises of the “separated but coordinated” principle become mutually contradictory, since the spheres of normative and institutional relationships no longer instantiate two autonomous and self-sufficient domains. In a complex system like the EU, the enforcement of supranational law at national level requires an elaborate judicial construction in which the nature of norms is assessed thanks to a multi-faceted judicial interpretation, where the role played by the rigid alternative direct/indirect effect is increasingly replaced by the more flexible instrument of consistent interpretation.<sup>76</sup> If that separation is not the only viable theoretical instrument for the ICC to establish a relationship with EU law (and with the CJEU in particular), an adequate commitment should be given to the elaboration of a doctrine of “constitutional sensitivity”, which could be the rising paradigm called to govern in the near future the concurring ambits of European and national judges whenever fundamental rights are at stake.<sup>77</sup>

## F. Conclusions

The changing attitude of the ICC toward the CJEU and the use of the preliminary reference procedure is quite evident, although its deep theoretical underpinnings ought to be further assessed in future referrals. On the one hand, the “fixed-term workers” case reveals that the most blatantly isolationist premises of the *Granital* doctrine are no longer tenable in the current European legal scenario. In this light, the overcoming of the definitional struggle on the judicial nature of the ICC and the partial acceptance of dual preliminaryity pave the way for a growing involvement of the ICC whenever its engagement is necessary in order to convey constitutionally qualified arguments to the CJEU. On the other hand, it should not be forgotten that this major involvement is not tantamount to encapsulating its future action within the monist setting pleaded for by the CJEU. As the question concerning the qualification of the ICC as a last instance court demonstrates, once the most untenable aspects of its previous case law are swept away, it must be entitled to carve out the “how” and “why” of its participation in the preliminary reference procedure,

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<sup>76</sup> Prechal, *supra* note 72, at 37.

<sup>77</sup> A similar view is shared by Stefano Civitarese Matteucci, *Breaking the Isolation? Italian Perspectives on the Dialogue between the CJEU and Constitutional Courts*, PAPER PRESENTED AT THE EDINBURGH LAW SCHOOL CONSTITUTIONAL DISCUSSION GROUP SEMINAR, 26 May, 2015, unpublished (courtesy of the Author) and, albeit in a not coincident perspective, by Cannizzaro, *supra* note 12, at 831, that emphasizes the “functional decoupling” (*duplicità funzionale*) between the CJEU and Constitutional Courts.

since it has at least the final say over the double allegiance (to the Constitution and to EU law) under which it operates.<sup>78</sup>

In this light, reinforcing the pluralist virtuality of the “separated but coordinated” principle in terms of a contrapunctual interaction between judicial actors could lead to an emphasis on the cooperative nature of the ICC’s engagement, as happened in both the 2008 and in the 2013 cases, instead of the antagonist attitude inherent in the various forms of *ultra vires* control triggered by other Constitutional Courts.<sup>79</sup> While the ICC has not hesitated in recent times to invoke a reservation of sovereignty in the face of decisions of the International Court of Justice<sup>80</sup> or the European Court of Human Rights,<sup>81</sup> it is widely acknowledged that in respect of EU law the activation of the *counter-limits* is likely to be a quite abstract possibility that could become merely hypothetical in case of a growing willingness on the part of the ICC to purport on a regular basis the “internal point of view” before the CJEU.

In sum, the strategic tenets of the solution provided for by the ICC seem to offer a viable response to the dilemmas of integration, since they tackle the challenges emerging from European constitutional pluralism in a spirit that is dialogical but not hostile and is centered upon dialogical attitudes<sup>82</sup> and instruments rather than on an uncritical openness.<sup>83</sup>

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<sup>78</sup> Cannizzaro, *supra* note 12, at 830.

<sup>79</sup> Needless to refer, among others, to the *Landtová* case decided by the Czech Constitutional Court (Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*) or to the *OMT* case of the German Federal Constitutional Tribunal (Decision of 14 January 2014, 2 BvR 2728/13).

<sup>80</sup> ICC, Judgment 22. October 2014, No. 238 with respect to *Jurisdictional Immunities of the State* (Germany v. Italy), ICJ Reports 2012, 96.

<sup>81</sup> ICC, Judgment 28. November 2012, No. 264.

<sup>82</sup> GIUSEPPE MARTINICO, *THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS. THE FRUSTRATING KNOT OF EUROPE* 116 (2013).

<sup>83</sup> As far as the role of Constitutional Courts in the European legal landscape is concerned, the pluralist setting enshrined in the “constitutional sensitivity” approach could lead to an understating of the clash between the “jurisprudence of constitutional conflict” setting. See Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 *ELJ* 262 (2005). For the strain toward the establishment of a “European constitutional democracy” recently proposed by Jan Komárek, see Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 *I-CON* 525 (2014). Their mutual commitment to constitutional pluralism can be emphasized in that the need to provide a balance between European and national constitutional supremacy cannot find a solution only in the reasons and arguments advanced by (national and supranational) courts, because a more deep commitment to the value choices enshrined in the *continuum* EU-national law is required: either in terms of the relevant principles governing the “constitutionalism beyond the State” paradigm (“the formal principle of legality, jurisdictional principle of subsidiarity, the procedural principle of democracy, and substantive principle of the protection of basic rights or reasonableness,” Kumm, *supra* in this note, at 299) or by recalling the capacity of Constitutional Courts to

It must, however, be noted that the effort to overcome the ICC's previous misplacement risks being nullified if the CJEU does not take into account the preferred position of the ICC (as of every other Constitutional Court) in order to convey before it constitutionally sensitive claims. As the decision taken by the CJEU in the fixed-term workers case demonstrates,<sup>84</sup> the European adjudicator is persistently reluctant to bring to light the constitutional tone of its responses to the referring judges, whereas it traditionally showed a masterly ability to deal with constitutional claims in implicit and silent forms.<sup>85</sup> However, when the reference involves basic constitutional values and stems from a Constitutional Court, the *octroyée* construction of constitutional traditions<sup>86</sup> cannot be the solution. On the contrary, *Voice* (by national Constitutional Courts) and *Loyalty* (by the CJEU) are more and more necessary in order to take those constitutionally shaped arguments into account, since the constitutional pluralism embodied in the European space "finds its roots in the *nature* of cases before courts, and develops a methodology for the resolution of the conflict, particularly when it entails a normative clash and judicial review must be put into action."<sup>87</sup>

In the light of the growing acceptance by the Constitutional Courts of the preliminary reference procedure, and even more so in the face of the cooperative attitude displayed by many of them (like the ICC), the time should indeed be right for the CJEU to place the nature and the scope of the references raised by them on a different footing than the rest of cases and to show a major concern for their arguments whenever a constitutionally responsive judgment is required.

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revitalize the communicative arrangement for those who are *de facto* excluded by the enjoyment of EU individual freedoms (Komárek, *supra* in this note, at 539).

<sup>84</sup> Joined Cases C-22/13, C-61/13 to C-63/13, and C-418/13, 2014, Raffaella Mascolo v. Ministero dell'Istruzione, dell'Università e della Ricerca, (Nov. 26, 2014), <http://curia.europa.eu/>.

<sup>85</sup> Daniel Sarmiento, *National Voice and European Loyalty. Member State Autonomy, European Remedies and Constitutional Pluralism in EU Law*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF MEMBER STATES* 325, 336 (Hans-W. Micklitz & Bruno De Witte eds., 2012). It must however be observed that *Mascolo* was mainly addressed to the legislator because of the persistent and massive noncompliance of the school recruitment system with the basic criteria of EU law with regard to fixed-term employment.

<sup>86</sup> Dani, *supra* note 10, at 168. In a similar vein see Fabian Amtenbrink, *The European Court of Justice's Approach to Primacy and European Constitutionalism—Preserving the European Constitutional Order?*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF MEMBER STATES*, 35, 60 (Hans-W. Micklitz & Bruno De Witte eds., 2012).

<sup>87</sup> Sarmiento, *supra* note 85, at 344, with reference to A.O. HIRSCHMANN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

## The First Preliminary Reference of the French Constitutional Court to the CJEU: *Révolution de Palais* or Revolution in French Constitutional Law?

By François-Xavier Millet & Nicoletta Perlo\*

### A. Introduction

A preliminary reference on the part of the Constitutional Council was, in several respects, not to be expected. It was debatable whether it would consider itself as a “court or tribunal” within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU) and, therefore, whether it would refer a case to the European Court of Justice (CJEU) at all. The French constitutional court could also have resorted to the *acte clair* doctrine so as to escape from their obligation to ask for the interpretive guidance of the CJEU. However, the main reason why a reference was not awaited by legal actors lies in the limited jurisdiction of the Constitutional Council. Until the introduction in 2008 of the so-called QPC, that is, *question prioritaire de constitutionnalité*<sup>1</sup> (the Priority Preliminary Reference mechanism on issues of constitutionality), the *Conseil constitutionnel* had a very limited jurisdiction compared to its European counterparts. Its main mission was to assess the conformity of parliamentary bills and treaties with the Constitution and only with the Constitution. Its review could only take place *ex ante*, between the adoption and the promulgation of a text. By opening the way to an *ex post* review of statutes with regard to the rights and freedoms guaranteed by the Constitution, the QPC brought about a major change in the French adjudication system: statutes are no longer immune from constitutional challenge once they are in force. However, treaties and other international or European commitments are no parameters of constitutional review. The *Conseil constitutionnel* made this clear in 1975 and never seriously changed track, despite minor qualifications to the rule. In their seminal *IVG* ruling on the Voluntary Interruption of Pregnancy Act,<sup>2</sup> they held that it was not up to them to review the

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<sup>1</sup> See Otto Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective*, 6 EUR. CONST. L. REV. 223–48 (2010); DOMINIQUE ROUSSEAU, *LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE* (2010); XAVIER MAGNON, *QPC, LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE: PRINCIPES GENERAUX, PRATIQUE ET DROIT DU CONTENTIEUX* (2013).



compatibility of bills with treaties, in spite of Article 55 of the Constitution.<sup>3</sup> Consequently, the task of the constitutional judges does not go beyond the assessment of laws with regard to the Constitution. This is the main reason that explains why, on the face of it, the *Conseil constitutionnel* was unlikely to refer a case to the CJEU. Why would it seek the interpretation or ask for the review of a European text if this text is immaterial for it and if the yardstick of its examination is the Constitution and only the Constitution? Yet, it happened. For the first time, the *Conseil* referred a case to the CJEU on 4 April 2013. Although this is undoubtedly a major legal breakthrough, we will see in due course that this is probably more a *révolution de palais* than a true revolution in French constitutional law.

## B. The Case

At the beginning of this affair, a British court issued a European Arrest Warrant [EAW] for kidnapping against a male British national, Jeremy F, a secondary school mathematics teacher who had left the country with one of his female students, who was then fifteen and a half years old. He was arrested in France and he agreed to be handed over to the UK judicial authorities, in compliance with Framework Decision 2002/584,<sup>4</sup> but without agreeing to waive<sup>5</sup> the benefits deriving from the rule of specialty, according to which “a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.”<sup>6</sup>

Thus, once delivered to the British authorities, solely on the basis of charges of “kidnapping a minor,” Jeremy F could not be brought to trial for any other crimes within the United Kingdom. However, due to the young student’s voluntary participation in the escapade, the UK authorities did not have a solid case for the charge in question, and wished to broaden the scope of the investigation and potential charges. Once Jeremy F was repatriated, they called on the investigating judge of the Court of Appeal of Bordeaux to

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<sup>2</sup> *Conseil constitutionnel*, decision 74–54 DC of 15 January 1975, *Voluntary Interruption of Pregnancy Act*.

<sup>3</sup> Article 55 reads, “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

<sup>4</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states, amended by Framework Decision 2009/299/JHA of February 26 2009.

<sup>5</sup> Pursuant to Art. 13(1) of the Framework Decision.

<sup>6</sup> Art. 27(2) of the Framework Decision. The CJEU specified that “it is important to check whether the elements of the offence, according to the legal definition of the offence of each Member State, are those for which the person was delivered and if there is sufficient correspondence between the data contained in the arrest warrant and that contained in the subsequent procedural acts.” Case C–388/08 PPU, Criminal proceedings against Artur Leymann and Aleksei Pustovarov, 2008 E.C.R. I–08993.

extend the effects of the surrender decision in order to include the offence of "sexual intercourse with a minor under the age of 16," based on Articles 27(3)(g) and 27(4) of Framework Decision 2002/584.<sup>7</sup>

The French investigating judge accepted the request on 15 January 2013. Jeremy F, having thus been made aware that he was liable to receive a sentence twice as long as that for the previous charge, quickly moved to challenge the legal basis of this extension before the French *Cour de cassation* (the top court in civil and criminal matters), arguing that the UK authorities had gone beyond the limits of the principle of speciality, which imposed strict limits upon their actions.

However, such an appeal is precluded by the wording of Article 695–46, paragraph 4 of the French Code of Criminal Procedure. This article states, "the investigating judge's ruling may not be appealed against." This was why the claimant also asserted his right to a priority preliminary reference on issues of constitutionality (QPC), challenging the compliance of this legal provision with the constitutional principle of equality before the law and with the right to due process.

In addressing this case, the French Court of Cassation was confronted with a complex and intricate legal issue involving the determination of the true author<sup>8</sup> of the contested norm. The fourth paragraph of Article 695–46 is grounded in EU law and was added to the code via the Act of March 9th 2004,<sup>9</sup> which transposed the rules concerning EAWs,<sup>10</sup> namely the framework decision of 13 June 2002 on the EAW. The question is whether the impossibility of an appeal in the case of an extended EAW derives from the framework decision drafted by the EU legislator or was decided by the national legislators who transposed the framework decision, and who, in so doing, used their margin of appreciation in violation of constitutional principles. Depending upon the answer to this question, the norm could be subject to different kinds of control, each triggering its own set of consequences.

In order to give full effect to the EAW, the French authorities effectively granted a sort of "constitutional immunity"<sup>11</sup> to all legal provisions transposing European rules in this area.

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<sup>7</sup> Under British law the offence of "sexual intercourse" refers to a minor for persons aged under sixteen, whereas under French law the offence of sexual assault on a minor is only applicable when the victim is under fifteen.

<sup>8</sup> Henri Labayle & Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 461 (2013).

<sup>9</sup> Act No. 2004–204 of March 9th 2004, *Official Journal* No. 59 of 10 March 2004, at 4567.

<sup>10</sup> Art. 695–11 to 695–51 of the Code of Criminal Procedure.

<sup>11</sup> Bruce Rabillon, *Question sur la question! Nouvelles déclinaisons du contrôle de la constitutionnalité des lois de transposition*, 23 *POLITEIA* 99 (2013).

Since the enactment of the Constitutional Act of 25 March 2003,<sup>12</sup> Article 88–2 of the Constitution reads, “The law sets down the rules concerning European arrest warrants in compliance with legal decisions adopted by the institutions of the European Union”. It follows from this constitutional amendment that legal provisions ensuring the application of European law regarding the EAW shall not be considered unconstitutional, even in cases of breach of other constitutional principles, including those amounting to the “*constitutional identity of France*.”<sup>13</sup> However, the provisions that do not necessarily derive from EU norms can be challenged through a QPC. In the case of litigation raising the question of the compliance of certain legal provisions relating to EAWs with the Constitution, it is therefore of paramount importance to determine whether any non-conformity with the Constitution is imputable to European law—in which case it is “covered” by Article 88–2 C—or whether it falls within the margin of appreciation granted to national legislators, in which case it may be challenged.

Establishing the genealogy of such norms is not an easy task. Articles 27 and 28 of the framework decision, upon which paragraph 4 of Article 695–46 is based, are silent vis-à-vis the possibilities of appeal that should be offered by national legislation. Both articles specify that “the decision [concerning a request for an extension or for extradition based upon a European Arrest Warrant] will be issued within thirty days of the request.”<sup>14</sup> As for Article 695–46 of the Code of Criminal Procedure, paragraph 4, this provision prescribes that the investigating judge in charge of processing such requests issues a “ruling without the possibility of appeal (...) within thirty days.” The issue requiring clarification is whether the absence of any possibility of recourse against the ruling of the investigating judge “necessarily flows from the obligations” prescribed by Articles 27 and 28 of the framework decision, requiring the judge to rule within thirty days of the request, or whether it stems from the French legislator’s freedom of choice. The framework decision seemed to provide a few hints regarding questions of interpretation, requiring the establishment of a series of (undefined and rather ambiguously-worded) “sufficient safeguards”<sup>15</sup> vis-à-vis the enforcement of EAWs, stating that “the current framework decision is not meant to

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<sup>12</sup> The Constitutional Act No. 2003–267 of March 25 2003 (*Official Journal* No. 72 of March 26, 2003 at 5344) was adopted prior to the transposition into French law of the Framework Decision, in order to address the incompatibility identified by the Council of State (Advisory Opinion no. 368282 on 26 September 2002, EDCE 54, no. 2003 at 192), of this secondary piece of legislation with a fundamental principle recognized by the laws of the Republic, “that the state should be allowed to refuse extradition for offences which it considers as political offences or related to political offences.”

<sup>13</sup> On this concept and its comparative use, both in EU law and in domestic law, see FRANÇOIS XAVIER MILLET, *L’UNION EUROPÉENNE ET L’IDENTITÉ CONSTITUTIONNELLE DES ETATS MEMBRES* (2013).

<sup>14</sup> Art. 27(4); Art. 28(3)(c).

<sup>15</sup> “Rulings on the execution of the European arrest warrant must be subject to sufficient controls which means that a judicial authority of the Member State where the person has been arrested will have to take the decision to surrender the person in question.” Recital 8 of the Framework Decision.

prevent a Member State from applying its own constitutional standards regarding the right to a fair trial . . . .”<sup>16</sup> However, in the absence of explicit provisions, the European lawmaker’s presumed intention of leaving the regulation of EAWs to the discretion of its Member States would seem insufficient to clarify Articles 27 and 28 in this regard.

The Court of Cassation, obliged as it was to make a ruling, deemed that the choice to bar “all possibilities of appeal” was made by the French lawmaker. By a decision delivered on 19 February 2013,<sup>17</sup> it referred the question of constitutionality to the French Constitutional Court and did not make a reference to the CJEU, as would have been required had the origin of the legal standard been attributed to European lawmakers.

The French *Cour de cassation* ascertained that the QPC met the three criteria foreseen by the organic law of 10 December 2009.<sup>18</sup> The challenged legal provision was “applicable . . . to the procedure,” namely the appeal before the Supreme Court; it “[had] not yet been deemed in compliance with the Constitution through a ruling of the Constitutional Court”; and finally, the constitutionality issue “[was] paramount since the provision challenged [was] likely to constitute a breach of the right to an effective appeal and of equality before the law.”

### C. The Preliminary Reference

The Constitutional Court clearly asserted the constitutional immunity of legislation deriving from the framework decision and decided to refer the case to the CJEU.<sup>19</sup>

First, the Constitutional Court gave an interpretation of Article 88–2 of the Constitution, stating, “[b]y these special provisions, the constituent legislator intended to remove constitutional barriers precluding the enactment of the legislative provisions that necessarily follow from the acts adopted by the institutions of the European Union relating to the European arrest warrant.”<sup>20</sup>

The assessment of conformity with the constitution is thus obviated in relation to the legal provisions dealing with the substantive rules relating to EAWs, in conformity with the constitutional immunity of secondary legislation provided for by the French constituent

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<sup>16</sup> Recital 12 of the Framework Decision.

<sup>17</sup> Ruling no. 13–80491.

<sup>18</sup> Organic Law no. 2009–1523 on the application of Art. 61–1 of the Constitution.

<sup>19</sup> *Conseil constitutionnel*, decision no. 2013–314P QPC, April 4, 2013, *Jeremy F. [Absence of appeal in case of extension of the effects of the European arrest warrant - preliminary issue to the Court of Justice of the European Union]*, *Official Journal* of April 7, 2013, at 5799.

<sup>20</sup> Recital 5.

power in 2003. However, such constitutional immunity is *only* applicable to legal norms that “necessarily flow” from the requirements of this provision. The Constitutional Court thus concluded that:

In consequence, it is for the Constitutional Council when seized in relation to legislative provisions on the European arrest warrant to review the constitutionality of such legislative provisions that result from the exercise by the legislator of the margin of appreciation provided for under Article 34 of the Treaty on European Union, in the version currently in force.<sup>21</sup>

The *Conseil constitutionnel* thus made it clear that the barrier constructed between the legal provisions and the Constitution (that is, the so-called “constitutional immunity”) is not absolute, but flexible and dependent upon the lawmaker’s discretionary power. It was therefore up to the constitutional court to rule whether, in the case at hand, and considering the particular provisions of the framework decision, the French lawmaker merely exercised his discretion or was constrained by EU law to adopt a specific norm.<sup>22</sup>

The Court therefore examined the terms of Articles 27 and 28 of the framework decision in detail together with the solemn affirmation regarding the respect of fundamental rights referred to in Article 6 TEU.<sup>23</sup> The Court then turned to sketch out the application of its review power vis-à-vis the legislative provisions of the Code of Criminal Procedure:

It shall be for the Constitutional Court to determine whether the provision of this law text which calls for the investigating judge to “rule without the possibility of appeal and within thirty days” necessarily results from the requirement imposed upon the judicial authorities of the member state, by paragraph 4 of Article 27, and by point c) of paragraph 3 of Article 28 of the framework decision, which calls for a ruling within thirty days from the date on which the request has been received.<sup>24</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Eva Bruce Rabillon suggests a new “compulsory review” that the Constitutional Court would be required to make in cases involving the laws of the Union. Bruce Rabillon, *supra* note 11, at 99.

<sup>23</sup> Recital 6.

<sup>24</sup> Recital 7.

The Court then outlined the results of its constitutional review in this case:

Under the aforementioned terms of the framework decision, an assessment of the possibility of an appeal against the original decision of the court, beyond the period of thirty days, and suspending the execution of the original decision requires that a ruling be provided on the interpretation of the act in question, and that, pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union alone shall have jurisdiction to issue preliminary rulings on such a question, and that, consequently, it is necessary to refer to it and to defer to it the decision concerning the priority issue of constitutionality raised by Mr. F.<sup>25</sup>

The Court found it impossible, under the terms of the framework decision, to exercise its discretion concerning the possibility of an appeal. It considered that the text was not clear enough for it to determine the precise intention of the European lawmakers on this point. Therefore, this issue should be referred to the CJEU for interpretation on the basis of Article 267 TFEU. The ruling of the EU judiciary would determine the possibility for the Constitutional Court to precisely define the scope of its review (or lack thereof) over the contested provisions of the Code of Criminal Procedure. Only if the CJEU were to deem that the exclusion of any appeal within thirty days fell within the discretion of the French legislature would the Constitutional Court be able to address the QPC raised by Jeremy F., under Articles 16 and 6 of the *Déclaration des droits* of 1789. The constitutional review was thus to be suspended until the decision of the CJEU. Like the Italian *Corte costituzionale*, the French Constitutional Court seems to consider the law of the Union as an “interposed norm,”<sup>26</sup> suitable as a “building block of constitutional criteria.”<sup>27</sup>

It should be noted that the preliminary reference to the CJEU in this case introduces two significant exceptions to the ordinary procedure before the Constitutional Court, constituting effective *pro futuro* precedents. First, the Constitutional Court defers a decision, pending the judgment of the CJEU. No law governing its competences acknowledges such a deferral. The Constitutional Court does not mention the legal basis for this right to defer a decision, thus suggesting that this represents a solution required by

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<sup>25</sup> *Id.*

<sup>26</sup> See *Corte costituzionale*, Rulings no. 7/2004, 166/2004, 406/2005, 129/2006 and 348/2007.

<sup>27</sup> Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, 2009 E.C.R. I-10821.

the very spirit of fair judicial cooperation inherent in the preliminary ruling procedure, the legal basis for which can be found in Article 88-1 of the Constitution.<sup>28</sup>

The second exception concerns the procedural deadlines set for exercising constitutional review: one month for the *a priori* review<sup>29</sup> and three months for *a posteriori* review.<sup>30</sup> Given the brevity of these deadlines, until 4 April 2013, the Court always maintained that it was impossible to call upon the CJEU in cases of *a priori* constitutional review.<sup>31</sup> As regards *a posteriori* review, the Secretary General of the Court had previously specified that the three month deadline “is not sanctioned by the relinquishment of jurisdiction on the part of the Constitutional Court in cases of non-compliance.”<sup>32</sup>

In the *Jeremy F.* case, the Constitutional Court therefore considered that it was possible to refer the case to the CJEU within the context of successive judicial review by multiple courts (at national and European level), but, being conscious of the fact that the average length of a conventional preliminary ruling procedure was incompatible with the procedure of the French Constitutional Court,<sup>33</sup> requested that the CJEU assess the case via the urgent preliminary ruling procedure.<sup>34</sup> The request was justified on the basis of the obligations relating to procedural delays, on the one hand, and the deprivation of liberty of the applicant in the context of the main proceedings, on the other.<sup>35</sup> However, despite

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<sup>28</sup> Jerome Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, REVUE TRIMESTRIELLE DE DROIT EUROPEENNE 531 (2013). According to Xavier Magnon, the jurisprudence of the CJEU also serves as implicit basis for this procedural exception, including *Factortame* (Case C-213/89, *Factortame Ltd*, 1990 E.C.R. I-2433, para. 23) and *Melki and Abdeli* (Cases C-189/10 & C-188/10, *Aziz Melki and Selim Abdeli*, 2010 E.C.R. I-5667, para. 56). X. Magnon, *La révolution continue : le Conseil constitutionnel est une juridiction... au sens de l'article 267 du Traité sur le fonctionnement de l'Union européenne*, 96 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 930 (2013/4).

<sup>29</sup> Const. Art. 61, para. 3.

<sup>30</sup> Art. 23–10 of amended ordinance 58–1067 of 7 November 1958 on the organic law on the Constitutional Council.

<sup>31</sup> *Conseil constitutionnel*, decision no. 2006–540 DC of 27 July 2006, para. 20, Rec. 88. Also, decision no. 2006–543 DC of 30 November 2006; decision no. 2010–605 of 12 May 2010, para. 18.

<sup>32</sup> Marc Guillaume, *QPC: textes applicables et premières décisions*, 29 CAHIERS DU CONSEIL CONSTITUTIONNEL 21 (2010).

<sup>33</sup> The latest annual report on the activity of the courts of the Union establishes the average duration for a preliminary ruling, excluding procedural incidents, as being 15.7 months for 2012. Report available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685\\_2012\\_6020\\_cdj\\_ra\\_2012\\_fr\\_proof\\_04.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685_2012_6020_cdj_ra_2012_fr_proof_04.pdf).

<sup>34</sup> Art. 23bis of Protocol No. 3 to the TFEU on the status of the CJEU; Art. 104ter of the Rules of Procedure of the Court. The last annual report of the Court indicates that the average decision time was 1.9 months in 2012. The risk of procedural distortions is thus lower.

<sup>35</sup> Para. 8.

being granted access to the emergency procedure by the CJEU, the three month deadline for the ruling was not respected.<sup>36</sup> This did not invalidate the substantive decision of the Constitutional Court. It would seem that the new procedure "P QPC" (Preliminary prior question regarding constitutionality) implies a certain tolerance with regard to deadlines to issue a judgment.

#### D. The CJEU Preliminary Ruling

The *Jeremy F.* ruling<sup>37</sup> exemplifies the latent tension existing between human rights protection and effectiveness of criminal proceedings across Europe. In its answer, the CJEU proved rather lenient towards both the Constitutional Council and *domestic* protection of human rights.

As usual, the Court started its analysis by recalling the purpose of the EAW. Founded on the salient principle of mutual recognition, it seeks "to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice."<sup>38</sup> Turning to the assessment of the possibility of bringing an appeal with suspensive effect against the decision of the judicial authority, the Court noted that the Framework Decision did not expressly provide for such an appeal. According to the CJEU, this absence was unproblematic under EU law given that the possibility of filing an appeal was not required by the Charter, especially Article 47 guaranteeing the right to an effective remedy. It was sufficient that "the entire surrender procedure between Member States is . . . carried out under judicial supervision."<sup>39</sup> Although this reasoning is not necessarily flawless, as we could have actually conceived of an enhanced right to an effective remedy under the Charter, it is understandable. In reasoning in this way, the CJEU renounced a maximal level of human rights protection, showing that it cannot be a Court that is exclusively concerned with human rights but that rather, it must endeavor to strike a fair balance with other considerations.

This did not, however, prevent the Constitutional Council from ensuring a higher protection of human rights at the national level. The CJEU judged that the Framework Decision did not preclude Member States from providing for an appeal suspending the execution of the decision of the judicial authority consenting to the extension of the EAW.

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<sup>36</sup> The *Conseil* received the case on February 27, 2013 and the decision was granted on the merits of the case on 14 June 2013.

<sup>37</sup> Case C-168/13 PPU, *Jeremy F.*, (May 30, 2013), <http://curia.europa.eu/>.

<sup>38</sup> *Id.* at para. 35.

<sup>39</sup> *Id.* at para. 46.



In the absence of further detail in the actual provisions of the Framework Decision, and having regard to Article 34 EU, which leaves the national authorities the choice of form and methods needed to achieve the desired results of Framework Decisions, it must be concluded that the Framework Decision leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues.<sup>40</sup>

According to the Court, the national Parliament has a discretionary power and can freely decide whether it shall lay down the possibility of filing an appeal. Using the words of the Constitutional Council, we can rephrase it as saying that neither the prohibition, nor the imposition, of an appeal is the *necessary consequence* of the Framework Decision. The latter is neutral in this respect. What matters for the Court overall is the correct application of the EU secondary act: "Provided that the application of the Framework Decision is not frustrated, as the second paragraph of recital 12 in the preamble states,<sup>41</sup> it does not prevent a Member State from applying its constitutional rules relating inter alia to respect for the right to a fair trial."<sup>42</sup>

However, in order to limit the adverse effects of such an appeal on effectiveness, the Court introduced a caveat. It came to the conclusion that Articles 27(4) and 28(3) of the Framework Decision did not preclude Member States from providing for an appeal suspending execution of the decision of the judicial authority which gives its consent to the extension of a EAW to include prior offences, "provided that the final decision is adopted within the time-limits laid down in Article 17 of the Framework-Decision."<sup>43</sup> To reach such an outcome, the Court was satisfied that "the possibility of having a right of appeal follows implicitly but necessarily from the expression 'final decision' used in Article 17 (2), (3) and (5) of the Framework Decision."<sup>44</sup> Nonetheless, those provisions did not leave an unfettered discretion to the Member States, as they set tight time limits for the executing judicial authority to come up with a "final decision." For the Court, "it follows from the

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<sup>40</sup> *Id.* at para. 52.

<sup>41</sup> Recital 12 *in fine* reads, "This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

<sup>42</sup> *Jeremy F.*, Case C-168/13 PPU, at para. 53.

<sup>43</sup> *Id.* at para. 75.

<sup>44</sup> *Id.* at para. 54. Article 17 especially deals with the time limits to execute the EAW. It sets tight time limits for the executing judicial authority to come up with a "final decision." However, the Framework Decision fails to define what "final decision" actually means.

decision that certain limits must be set as regards the margin of discretion enjoyed by Member States in this respect.”<sup>45</sup> This comes from the “*underlying logic* of the Framework Decision and to its objectives of accelerating surrender procedures.”<sup>46</sup> In view of the tightness of the time-limits and the need to swiftly reach “final decisions,” the CJEU put a limit on the discretion of national authorities in implementing the EAW into domestic law. This is not surprising, as Member State procedural autonomy is traditionally limited by the principles of equivalence and effectiveness of EU law. As Articles 27(4) and 28(3) did not set time-limits for the “final decision” properly so called, the Court still held that the national authorities had to comply with the time-limits laid down in Article 17 of the Framework Decision for making a final decision.

On reading it, the judgment of the Court strikingly favors not only the protection of human rights generally speaking (at the expense of “*the underlying logic*” of the EAW, which may be understood to mean effectiveness and swiftness) but, more precisely, it emphasizes domestic human rights. However, it is doubtful that the CJEU has started off a new trend. It seems rather that the approach here has more to do with the specifics of the case, namely the very first preliminary reference of the Constitutional Council. The CJEU might have been willing to give further incentives to the *Conseil*, as it did already in *Melki and Abdeli*. As a response to the cooperative stance of the *Conseil constitutionnel*, the lenient approach of the CJEU is to be praised. It is a way to lure the Constitutional Council and those other constitutional courts that remain reluctant to engage in a dialogue with the CJEU through Article 267 TFEU. Moreover, it is valuable for the image of the CJEU, as it gives the impression that human rights rank highly on the CJEU’s agenda when it comes to European Criminal Law and, more broadly, the area of freedom, security and justice.<sup>47</sup> The Constitutional Council could then draw all consequences from the CJEU ruling for the sake of human rights.

#### E. Back to the Constitutional Court

Two weeks after the decision of the CJEU, the French Constitutional Court ruled on the merits of the case, in conformity with the interpretation decided upon by the European Court. The *Conseil* quashed Article 695–46, paragraph 4 of the Code of Criminal Procedure, after noting that, according to the judgment of the CJEU, this provision “does not necessarily flow from the legal acts of the European Union institutions concerning the

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<sup>45</sup> *Id.* at para. 56.

<sup>46</sup> *Id.* at para. 73(emphasis added).

<sup>47</sup> For further analysis of the CJEU ruling, see François Xavier Millet, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195, 213–15 (2014).

European Arrest Warrant”<sup>48</sup> and should therefore be examined for compliance with the rights and freedoms guaranteed by the Constitution. Article 695–46, paragraph 4 is not covered by Article 88–2 of the Constitution, which could have constituted an obstacle to constitutional review, had the authorship of the standard been attributed to the European lawmakers by the CJEU.

For the Constitutional Court, the lawmaker’s margin of appreciation in the transposition of an act of secondary legislation of the Union prevents it from taking the requirements of effective judicial protection lightly. The *Conseil’s* case law is clear on this point: according to Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789,<sup>49</sup> “no substantial encroachments may be made upon the right of the individuals concerned to seek effective relief before a court.”<sup>50</sup> This does not entail that the right to be brought before a judge is absolute in its scope. The Constitutional Court guarantees the effectiveness of the available appeal procedures and possible equivalents thereto, without going as far as giving constitutional status to the right to be brought before two separate courts. In the case at hand, the refusal of the lawmaker to grant the right to appeal with regard to the extension of proceedings relating to an EAW constituted an “unjustified restriction”<sup>51</sup> in view of the fact that this restriction was not the necessary result of an obligation imposed by EU law.

The Constitutional Court then turned to the scope of its decision,<sup>52</sup> using a now-standard formula to imbue it with *ex tunc* effect,<sup>53</sup> accompanied by the provision that the

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<sup>48</sup> *Conseil constitutionnel*, decision no. 2013–314 QPC, 14 June 2013, *M. Jeremy F. [Absence of appeal in case of extension of the effects of the European arrest warrant]*, Official Journal, 16 June 2013 at 10024, para 8.

<sup>49</sup> “A society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all.”

<sup>50</sup> *Conseil constitutionnel*, decision no. 2012–283 QPC on 23 November 2012, para. 11.

<sup>51</sup> *Conseil constitutionnel*, decision No. 2013–314 QPC.

<sup>52</sup> According to Article 62, paragraph 2 of the French Constitution, “A provision declared unconstitutional on the basis of Article 61–1 is revoked as from the publication of the decision of the Constitutional Council or at a later date stipulated in the decision. The Constitutional Council determines the conditions and the limits under which the effects produced by the provision may be questioned.” This formula is quite confusing in its wording and actually awards mixed effects to the Council’s rulings- *ex nunc* and *ex tunc*, according to a modulation performed by the constitutional court itself. See on this subject, Magnon, *La modulation des effets dans le temps des décisions des juges constitutionnels*, ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNEL 558–91 (2011); Cartier, *L’effet utile des déclarations d’inconstitutionnalité*, 23 POLITEIA 15–55 (2013).

<sup>53</sup> “As a matter of principle, the declaration of unconstitutionality must benefit the party submitting the priority question on constitutionality and the provision ruled unconstitutional cannot be applied to proceedings in progress at the time the decision of the Constitutional Council is published, the provisions of Article 62 of the Constitution grant the Council the power both to set the date of repeal and to defer its effects as well as to provide for the review of the effects that the provision generates before this declaration takes effect.” This formula has been standard since the decision of the Constitutional Council QPC No. 2011–110 of 25 March 2011.

declaration of non-conformity with the Constitution would take effect upon publication of the Constitutional Court's decision, and would be applicable to all appeals that were currently in process.<sup>54</sup>

So, what are the practical consequences of the partial abrogation of Article 695–46, paragraph 4 of the Code of Criminal Procedure? Decisions that are pending and not yet final may be appealed against before the Court of Cassation. However, these appeals and any reviews thereof are subject to strict deadlines, so that the very final decision is not delivered on a date that exceeds the sixty-day deadline prescribed by the framework decision.<sup>55</sup> Considering the fact that the investigating chamber must rule within thirty days of receipt of the request,<sup>56</sup> the deadline for the review of a potential appeal against the initial decision should theoretically be less than thirty days. However, the rules governing appeals in criminal matters are inadequate for this purpose<sup>57</sup> and should be discarded. If the legislators fail to engage in swift reforms concerning this matter, it will be the role of the Court of Cassation, within certain parameters, to mention the deadlines for the submission and review of appeals. The Court of Cassation will thus play the role of a “juris-lator,” justifying such a move through the necessity of imposing an interpretation of Article 695–46, paragraph 4 of the Code of Criminal Procedure that is in compliance with the framework decision,<sup>58</sup> with the words “without the possibility of appeal” having been expunged from the former. As has been correctly noted elsewhere, “the judges still therefore have the last word as they are the fundamental makers of a fair Europe.”<sup>59</sup>

## F. The Scope of the First Preliminary Reference

### *1. The French Constitutional Court as a Judicial Body in European Law*

The first and most basic observation raised by the first preliminary question treated by the French Constitutional Court concerns the status of the *Conseil* itself: beyond mere doctrinal debates, at the European level, the Constitutional Court now qualifies as a Court, having jurisdiction for matters of European law. Under Article 267 TFEU, in fact, only national courts under the Treaty are entitled to make use of the preliminary reference

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<sup>54</sup> Decision No. 2013–314 QPC at para. 11.

<sup>55</sup> Art. 17 of the Framework Decision; *Jeremy F.*, Case C–168/13 PPU, judgment of 30 May 2013, pt. 64.

<sup>56</sup> Code of Criminal Procedure Art. 695–46, para. 4.

<sup>57</sup> Five clear days for filing an appeal; forty days to review.

<sup>58</sup> Consistent interpretation required by the principle of primacy. See Case C–105/03, Criminal Procedure against Maria Pupino, [2005] E.C.R. I–5309.

<sup>59</sup> Jerome Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, *supra* note 28.

procedure. Thus, on the one hand, by making a reference to the CJEU, the Constitutional Court signals that it considers itself to be a national court, and on the other hand, the CJEU's acceptance of its request acknowledges that the Constitutional Court meets the criteria of a judicial authority.

Indeed, the Council fulfills the various criteria for judicial authorities, as established by the case law of the CJEU.<sup>60</sup> It represents a "permanent body" established by law, the members of which are appointed by a public authority,<sup>61</sup> and the jurisdiction of which is compulsory, a body, moreover, that rules by means of "adversarial proceedings" applying "the rule of law." As to the criterion of judicial independence, given the constitutional and organic regulations that guarantee it, the Constitutional Court evidently takes on "the role of an objective outsider in relation" to the "authority,"<sup>62</sup> the acts of which are challenged before it. Finally, the guarantee of the impartiality of the members of the Court is undoubtedly somewhat imperfect, since in the course of previous positions they may have held, they may have taken part in the development of the legislative provisions that are being challenged or of European standards that may result in the dismissal of a claim.<sup>63</sup> However, it is clear that the CJEU applies the criteria with a certain degree of flexibility,<sup>64</sup> always assuming that the constitutional courts that submit preliminary references fulfill the criteria it has prescribed for defining judicial authorities.<sup>65</sup> The desire to encourage a certain degree of preliminary dialogue with the constitutional courts of the Member States takes clear precedence over the mere will to judge national practices (and particularly judicial traditions), which would be seen as inappropriate and intrusive by national authorities.

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<sup>60</sup> Case C-61/65, Vaassen Göbbels, 1966, E.C.R. I-395; Case C-54/96, Dorsch Consult, 1997 E.C.R. I-4961.

<sup>61</sup> Except for "rightful" members, who are former Presidents of the Republic. This is probably a malfunction of the French system of constitutional justice. See Patrick Wachsmann, *Sur la composition du Conseil constitutionnel*, 5 JUS POLITICUM 14-16 (2010).

<sup>62</sup> Case C-24/92, Corbiau, 1993 E.C.R. I-1277.

<sup>63</sup> Art. 4, Decision on the procedure before the Constitutional Council for priority issues of constitutionality of 4 February 2010 (Official Journal of 18 February 2010 at 2986).

<sup>64</sup> Despite the non-decisive character of the intervention of *Consiglio di Stato*, the Court acknowledged it as a court (Cases C-69/96 to C-79/96, Garofalo, 1997 E.C.R. I-5603). Similarly, the Dutch Council of State had been recognized as having jurisdiction at a time when it only exercised on a restricted basis (Case C-36/73, Nederlandse Spoorwegen, 1973 E.C.R. I-1299).

<sup>65</sup> Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, *supra* note 8.

*II. The Constitutional Court—Not the Ordinary Union Law Judge*

The preliminary ruling does not render the Constitutional Court an ordinary adjudicator of European Union law. This function is, in fact, an inseparable component of the process of judicial review of domestic law for compliance with the EU treaties, which, when exercised by national judges, guarantees the “full effect” of EU law through the non-application of national provisions that are contrary to European norms.<sup>66</sup> In France, in 1975<sup>67</sup> the Constitutional Court decided to decline jurisdiction in monitoring compliance of legislation with international treaties under Article 61 of the Constitution. This lack of jurisdiction was stressed in relation to the *a posteriori* review power on the basis of Article 61–1 of the Constitution.<sup>68</sup> The French ordinary EU law judge is, therefore, the civil or the administrative judge. The Constitutional Court, for the time being, remains keen on a strict construction of its unique nature and competences, namely reviewing the conformity of statutes with the sole Constitution.

Referral to the CJEU for a preliminary ruling has not triggered a change in the function of the Constitutional Court with respect to EU law; on the contrary, the route undertaken by the French judges confirmed the existing case law on this issue. On 4 April 2013, the Constitutional Court confirmed that it could rule solely on the constitutionality of laws and that the review required by Article 88–2 does not in fact constitute a species of judicial review for compliance with international treaties, but rather a simple “verification stage”<sup>69</sup> that must precede constitutional review,<sup>70</sup> and that is an indispensable component thereof.

Thus, the *Jeremy F.* case does not constitute a *volte-face*, but rather a step along the road of the Constitutional Court's European case law. Within the context of this journey, the P QPC 2013 follows the *Melki* case of 2010, giving continuity and depth to the judicial dialogue, and furnishing an important contribution to the debate on the order of referrals.

In the ruling *Aziz Melki and Selim Abdeli* of 22 June 2010,<sup>71</sup> the CJEU began an initial dialogue with the Constitutional Court,<sup>72</sup> attempting to address the thorny question of the

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<sup>66</sup> Case C–106/77, *Finance Administration of the State against Société anonyme Simmental*, 1978 E.C.R. I–629, pt. 24.

<sup>67</sup> *Conseil constitutionnel*, decision no. 74–54 DC, 15 January 1975, IVG.

<sup>68</sup> *Conseil constitutionnel*, decision no. 2011–217 QPC, 3 February 2012, *M. Mohammed Akli B.* Rec. p. 104.

<sup>69</sup> Bruce Rabillon, *supra* note 11, at 104.

<sup>70</sup> Along a similar line Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, *supra* note 8.

<sup>71</sup> Cases C–189/10 & C–188/10, *Aziz Melki and Selim Abdeli*, 2010 E.C.R. 2010 I–05667.

compatibility between the organic legal provisions relating to QPC and the provisions of Article 267 TFEU relating to the preliminary ruling procedure. In an *obiter dictum*, the CJEU implicitly invited the Constitutional Court to disregard the requirements deriving from Article 61, stating that “the requirement for a strict deadline imposed upon national courts cannot result in the impossibility of procuring a preliminary ruling on the validity of the provision under scrutiny.”<sup>73</sup> While in this quotation, the obligation of allowing the possibility of a preliminary ruling as a prerequisite for any form of judicial review refers to the difficulties in challenging the validity of a directive, it can also be readily applied to the interpretation of directives. The *Jeremy F.* ruling, three years later, undoubtedly constitutes a positive response to the request made by the CJEU.<sup>74</sup> The Constitutional Court agreed to go over the deadline for reviews in order to refer the preliminary issue to the CJEU, prior to exercising its own constitutional review.

Secondly, by means of its 2013–314 P QPC ruling, the Constitutional Court also seems to have settled the debate on the order of referrals, which was initiated by the *Cour de cassation* in 2010.<sup>75</sup> In its judgment concerning online games,<sup>76</sup> the Constitutional Court had already stated:

Neither Article 61–1 of the Constitution nor Articles 23–1 and following of the Ordinance of November 7<sup>th</sup> 1958 referred to hereinabove preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union.<sup>77</sup>

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<sup>72</sup> The CJEU referred in particular to the Council’s Ruling no. 2010–605 DC of 12 May 2010, *Law on the liberalising competition and sector regulation of gambling and online gambling*, rec. at 78.

<sup>73</sup> *Melki and Abdeli*, Cases C–188/10 and C–189/10 at para. 56.

<sup>74</sup> Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d’arrêt européen et le renvoi préjudiciel à la Cour de justice*, supra at note 8; Bruce Rabillon, supra at note 11, 119.

<sup>75</sup> On 16 April 2010 the *Cour de cassation* called upon the CJEU for an appeal of validity of an action concerning the compatibility of the priority of the QPC with the requirements of the CJEU for national judges as common law judges of the Union. Cass., *Aziz Melki*, No. 10–40002.

<sup>76</sup> Conseil constitutionnel, decision n° 2010–605 DC.

<sup>77</sup> Para. 14.

The Court added:

Sections 23–1 and following of the Ordinance of November 7<sup>th</sup> 1958 referred to hereinabove do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary hearing on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.<sup>78</sup>

The Constitutional Court has thus attributed to the QPC the status of an alternative preliminary reference, an additional tool for the protection of human rights in a legal sphere that has become European in nature. In other words, the QPC and the preliminary reference procedure are distinct in their scope and are to be used independently. In April 2013, the Constitutional Court itself resorted to the preliminary reference procedure. The French Constitutional Court thus masterfully demonstrated the complementarity of these two instruments, which should be used in a spirit of cooperation between national and European judicial institutions.

### *III. The Constrained Future of Preliminary Rulings from the Constitutional Court*

*Révolution de palais* or revolution in French constitutional law? Without minimizing the importance of this very first preliminary reference, it must nevertheless be noted that the perspectives opened up by this case are quite limited. Indeed, the possibility of raising a preliminary issue before the CJEU only happened because two conditions were fulfilled: the ability to make use of the urgent ruling procedure and the fact that the legal issue at stake concerned the European Arrest Warrant under Article 88-2 of the Constitution. However, since both the first and second conditions are rarely fulfilled, their coincidence will, most likely, very rarely resurface.

Regarding the first condition, the Constitutional Court, in the context of such a question, has shown itself able to bend certain tenets of its own rules of procedure, even issuing a valid ruling two weeks after the deadline imposed by the organic law. This exception observes the principle of loyal cooperation enshrined in Article 4(3) of the Treaty on European Union (TEU). However, it does not stretch to *a priori* constitutional review, which

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<sup>78</sup> Para. 15.



requires a shorter time limit,<sup>79</sup> and it only seems possible in the context of an urgent preliminary ruling procedure, given that the average ordinary procedure in the CJEU lasts approximately sixteen months.

Circumvention of the deadline came about due to reciprocal concessions that the Constitutional Court and the CJEU agreed on in this case: the Constitutional Court accepted the exceeding of the time limit since the CJEU delivered a ruling swiftly. It is, however, a contingent balance, which cannot be repeated regularly. Furthermore, the CJEU upheld two arguments presented by the Constitutional Court: The deprivation of liberty to which the applicant was subjected during the main trial, and the time limits which the Constitutional Court must observe when issuing a ruling. However, it is not certain that the mere presence of a deadline can be used in order to justify an emergency ruling in the future.<sup>80</sup> In addition, the use of the emergency procedure is limited to questions involving freedom, security, and justice,<sup>81</sup> which constitute a further obstacle to a broader use of the preliminary reference procedure by the Constitutional Court. As for the accelerated procedure,<sup>82</sup> which may involve any area of EU law, the conditions for its implementation seem too restrictive for this option to be used by a constitutional court. Indeed, an “extraordinary emergency” is required to justify the use of this procedure.<sup>83</sup>

Regarding the second condition, it is debatable whether referrals will be confined to the limited field of EAWs. One can have doubts as to the likelihood of further preliminary references when it comes to statutes transposing EU norms *other* than measures concerning EAWs. Only the latter enjoy full and absolute constitutional immunity under Article 88–2 of the Constitution. Through this provision, the constituent power consented without reservation to the EAW in all of its features, whereas it never explicitly endorsed the other numerous secondary norms that are adopted by the EU institutions and can have far-reaching legal effects domestically. For those norms, Article 88–1 of the Constitution is applicable.

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<sup>79</sup> Bruce Rabillon, *supra* note 11, at 124. Concerning the possibility for the Council to refer to the CJEU for a preliminary ruling in the context of preliminary oversight, see Jerome Roux, *supra* note 28.

<sup>80</sup> To our knowledge, this type of justification has not yet been received by the Court, which emphasized the deprivation of liberty suffered by a person pending the decision (*see, e.g.*, Case C–278/12 PPU, *Adil v. Minister voor Immigratie* (July 18, 2012), <http://curia.europa.eu/>) or the situation of children separated from their parents pending the settlement of custody cases (*see, for example*, Case C–497/10 P.P.U., *Mercredi v. Chaffe*, 2010 E.C.R. I–14309). Along a similar line: Marie Gautier, *L'entrée timide du Conseil constitutionnel dans le système juridictionnel européen*, 19 ANNUAIRE JURIDIQUE DE DROIT ADMINISTRATIF 1086 (2013); Xavier Magnon, *supra* note 28, at 932.

<sup>81</sup> Art. 23*bis* of the Statute of the CJEU.

<sup>82</sup> Art. 105 of the Rules of procedure before the CJEU.

<sup>83</sup> The CJEU acknowledged the urgency in the ruling *Melki and Abdeli*.

Article 88–1 is arguably the first and foremost provision relating to the European Union that can be found in the French Constitution. It reads:

the Republic shall participate in the European Union constituted by states which have freely chosen to exercise some of their powers in common by virtue of the Treaty on the European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.

Initially, Article 88–1 was perceived as being mainly symbolic and therefore deprived of any legal effect. Yet, it is being increasingly relied on by French judges as a constitutional mandate allowing, requiring, or prohibiting certain actions. *Inter alia*, in relation to EU directives, both the *Conseil constitutionnel* and the *Conseil d'Etat* have read into Article 88–1 a constitutional obligation to transpose directives.<sup>84</sup> Such an obligation already derives from EU law through the duty of loyal cooperation enshrined in Article 4(3) TEU. However, the domestic judges are still reluctant to ground their rulings on EU provisions. That explains why they discovered a *constitutional* requirement to transpose directives. In doing so, they not only gave a national constitutional imprint (in a dualistic fashion) to their judgments, but they were enabled to discretionarily set limits on this obligation, which were to be found in the Constitution itself and not in EU law. Above all, this obligation shall not trump the requirement for a directive to respect the “*constitutional identity of France*.”<sup>85</sup> The obligation to transpose directives is therefore relative and not stringent, as it shall yield before the constitutional core of the Member States. This is a major difference with EAWs, as the latter are fully immune from constitutional challenge. The *Conseil* did not mention French constitutional identity as a valid claim against national measures implementing EAWs. For domestic measures implementing *other* EU secondary acts, though, the infringement of constitutional identity may lead to a declaration of unconstitutionality.<sup>86</sup> To sum up, *under Article 88–2, no claim connected with constitutional identity can hold and a preliminary reference can be made. Under Article 88–1, constitutional identity can serve as a limit to EU integration and the prospect of an institutional dialogue with the CJEU remains uncertain.*

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<sup>84</sup> *Conseil constitutionnel*, decision no 2004–496 DC of 10th June 2004, *Act on Trust in the Digital Economy*; *Conseil d'Etat*, judgment of 8 February 2007, *Arcelor Atlantique et Lorraine*. On the *Conseil*'s ruling, see the annotation by JACQUELINE DUTHEIL DE LA ROCHÈRE, 42 COMMON MKT. L. REV. 859–69 (2005).

<sup>85</sup> *Conseil constitutionnel*, decision no 2006–540 DC of 27 July 2006, *Act pertaining to Copyright and Related Rights in the Information Society*.

<sup>86</sup> However, the *Conseil* made it clear that the constitution-making power could actually give up French constitutional identity: “[T]he transposition of a directive cannot run counter to a rule or principle inherent to the constitutional identity of France, *except when the constituting power consents thereto*.” *Conseil constitutionnel*, decision no. 2006–540 at para. 19 (our emphasis). On this controversial option, see FRANÇOIS XAVIER MILLET, *L’UNION EUROPÉENNE ET L’IDENTITÉ CONSTITUTIONNELLE DES ÉTATS MEMBRES* 42–45 (2013).

### G. Conclusion

The first preliminary reference of the French Constitutional Council to the CJEU is undoubtedly a milestone event, which may even herald the start of a new era. However, it might also remain isolated. Because of its curtailed jurisdiction, the *Conseil constitutionnel* will never have many opportunities to refer a case to the CJEU. Unless it overrules its current approach, any further preliminary reference is bound to happen in the course of the review of a domestic statute implementing EU law. If we now know that the *Conseil* will not shy away from sending in a case relating to the EAW, it remains to be seen whether it will repeat the experience in a situation involving another EU secondary norm that is not being specifically addressed in an *ad hoc* provision of the Constitution such as Article 88–2 but falls within Article 88–1. Although it is understandable that the *Conseil constitutionnel* is reluctant to engage in a dialogue with the CJEU when no less than national constitutional identity is infringed by EU law, it would, however, be well-advised to do so in order not to undermine the fragile European project.

## The German Constitutional Court and Preliminary References— Still a Match not Made in Heaven?

By Eva Julia Lohse\*

### A. Introduction

So far, the German Constitutional Court (*Bundesverfassungsgericht*, henceforth: *BVerfG*) has only made a single preliminary reference to the (now) Court of Justice of the European Union (CJEU), despite frequent rulings on matters connected with European Union (EU) Law. Its apparent reluctance seemed odd considering the atmosphere of dialogue and cooperation<sup>1</sup> which prevails between the non-constitutional courts and the EU courts. This situation might, however, have changed with the preliminary reference from January 2014,<sup>2</sup> proving predictions on the perceived “most powerful constitutional court” and its relationship to the EU partly wrong. The legal effects of its preliminary reference on the interpretation of Articles 119, 123, 127 ff. of the Treaty on the Functioning of the European Union (TFEU) and the validity of Outright Monetary Transactions (OMT) by the European Central Bank (ECB) under EU Law are as yet unclear; although the Opinion of the Advocate General Cruz Villalón was delivered in the beginning of 2015, which did not confirm the doubts expressed by the *BVerfG* about the conformity of the OMT programme with EU law. Nonetheless, the interpretative scheme and the normative questions as to the reluctance of the *BVerfG* remain the same after this single referral and offer explanations as to why the *BVerfG* had for nearly sixty years not referred a question to the former European Court of Justice (ECJ).

On a political level, there might be a simple answer, often claimed by the media: a fear of loss of influence.<sup>3</sup> One might assume that the *BVerfG* considers itself as the keeper of

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<sup>1</sup> See also Jörg Ukrow, *Von Luxemburg lernen heißt Integrationsgrenzen bestimmen*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 119, 122–23 (2014).

<sup>2</sup> 134 BVERfGE 366 [hereinafter *OMT*].

<sup>3</sup> See also—while denying this to be the case—Ulrich Everling, *Vorlagerecht und Vorlagepflicht nationaler Gerichte nach Art 177 EGV*, in VORABENTSCHEIDUNGSVERFAHREN VOR DEM GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFT 11, 14 (Reichelt ed., 1998); Jan Bergmann, *Das Bundesverfassungsgericht in Europa*, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 620, 627 (2004).

German fundamental rights and as a court too powerful to follow the interpretation of the Court of Justice of the European Union (CJEU) on constitutional matters. One might state that this denial impedes a true cooperation and communication between “constitutional” courts, and reduces cooperation to mere visits and academic discussions.<sup>4</sup> On a closer look, though, the situation is multifaceted:<sup>5</sup> a normative analysis of the case law allows three presumptions on the relationship between constitutional control by the *BVerfG* and its readiness for preliminary references. The pivot is a requirement of EU Law: in order to refer a question to the CJEU, the national court must consider the answer necessary to enable the national court to give judgment (Article 267(1) TFEU). This leaves a subjective margin of discretion for the national courts,<sup>6</sup> which they can use in order not to refer a question out of “political” reasons. It is also an objective criterion (C. I.), which is hardly reached before the *BVerfG* due to the specific structure and requirements of constitutional procedural law (B). However, the *OMT* decision shows that the requirements can be met and that the peculiarities of constitutional law may only be used as an “excuse” not to refer a question to the CJEU.

One can deduce the following three aspects that need to be considered by the *BVerfG* in the course of its deliberation: the use of preliminary rulings by non-constitutional courts on specific questions of Union Law (C. II.), the means for safeguarding the idea of cooperation between courts in the course of *ultra-vires*-control, and the so-called constitutional “identity” control (C. III.), and the (maybe futile) attempt to shield fundamental rights in the *Grundgesetz* (Basic Law, henceforth: GG) from EU influence, especially the EU Charter of Fundamental Rights (EChFR) (C.IV.).

#### **B. A Restricted Standard of Review: Requirements of German Constitutional Procedure Under the Influence of European Law**

One of the reasons that is claimed to underlie the reluctance of the *BVerfG* to refer are the particularities of the German system of constitutional review. The comparative constitutional lawyer may, however, doubt that the requirements and setting are so peculiar compared to other continental systems of constitutional review.<sup>7</sup>

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<sup>4</sup> See Jacques Ziller, *Le dialogue judiciaire et la Cour de Karlsruhe*, *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 93, 95 (2010); Maya Walter, *Integrationsgrenze Verfassungsidentität—Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, *ZEITSCHRIFT FÜR AUSLÄNDISCHES RECHT UND VÖLKERRECHT* 177, 197 (2012); Ukrow, *supra* note 1, at 123.

<sup>5</sup> See also Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 399, 407 (Armin v. Bogdandy & Jürgen Bast eds., 2010).

<sup>6</sup> Burkhard Heß, *Die Einwirkungen des Vorabentscheidungsverfahrens nach Art. 177 EGV auf das deutsche Zivilprozessrecht* 108 *ZEITSCHRIFT FÜR ZIVILPROZESSRECHT* 59, 75 (1995).

<sup>7</sup> For an overview, see BERND WIESER, *VERGLEICHENDES VERFASSUNGSRECHT* 120, 125 (2005).

The German system is that of a separate constitutional court entrusted with the review of all aspects of state action against the *Grundgesetz*. In this sense, it is a comprehensive review. Yet, it naturally means restricting the jurisdiction of the *BVerfG* to the interpretation of the German constitution. Questions of the interpretation and application of German statutory law are left to non-constitutional courts, and the interpretation of primary and secondary EU law is exclusively assigned to the CJEU according to Article 19 of the Treaty on the European Union (TEU). This attribution of competences seems clear and common for most constitutional courts following the Kelsenian model of constitutional review. However, *in concreto*, the spheres cannot be separated so easily. Hence it is important to understand in which situations the need for a preliminary reference arises. It is argued that a situation in which a referral was admissible and even necessary under the conditions of German procedural law had arisen prior to the preliminary reference in *OMT*, adding a particular political connotation to this first preliminary reference.

The main procedures leading to a review of German state action against the standard of the *Grundgesetz* and raising questions of EU law at the same time are the *Verfassungsbeschwerde* (individual constitutional complaint), the *abstrakte Normenkontrolle* (abstract review of legislation), *konkrete Normenkontrolle* (judicial review of legislation in form of a referral by a German court), and *Organstreitverfahren* (court proceedings between state organs).

(1) *Verfassungsbeschwerde*: an individual may claim the violation of his or her fundamental rights under the *Grundgesetz* (but not under the ECHR or the European Convention on Human Rights (ECHR)<sup>8</sup>) by state action, that is, by a statute, a court decision, or an administrative act. Contrary to those Member States which have incorporated the ECHR as directly applicable constitutional law (e.g., Austria) the German fundamental rights remain separate from their European counterparts. A *Verfassungsbeschwerde* is only admissible after all other remedies have been exhausted, therefore the non-constitutional courts are the prevailing interpreters of the GG and can also make references to the CJEU in matters of EU law. Yet, in rare circumstances, EU law may become relevant for the *BVerfG*.<sup>9</sup>

This may involve, first, a violation of a German fundamental right by a German statute transposing EU secondary law. In such circumstances, the *BVerfG* has to determine whether the Member States had a margin of implementation, as only national law not determined by EU law is bound by German fundamental rights.<sup>10</sup>

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<sup>8</sup> 110 BVERFGE 141, 154–55 [hereinafter *Kampfhunde*]; 115 BVERFGE 276, 299 [hereinafter *Winner Wetten*].

<sup>9</sup> See also Konrad Feige, *Bundesverfassungsgericht und Vorabentscheidungskompetenz des Gerichtshofs der Europäischen Gemeinschaften*, 100 ARCHIV FÜR ÖFFENTLICHES RECHT 530, 539–50 (1975).

<sup>10</sup> Thorsten Kingreen, *GRCh Art. 51 in EUV/AEUV KOMMENTAR* margin no. 12 (Christian Calliess & Matthias Ruffert eds., 4th ed. 2011).

A second circumstance in which EU law may become relevant is where the EU act is *ultra vires* or harms the immutable core of the *Grundgesetz* (Article 79(3) GG) and must therefore not be applied by German state actors. The *BVerfG* has accepted, in the context of EU integration, that a violation of the right to vote (Article 38(1) GG) can be claimed when the German parliament limits its sovereignty by transferring excessive competences to the EU. Every citizen can therefore assert that the limits of European integration as stated in Articles 23(1) and 79(3) GG are to be respected in any legislative act yielding sovereignty to the EU.<sup>11</sup>

Third, EU law may become relevant where the German legislature could not transfer powers to the EU due to the immutable core of the German constitution.

In the latter two situations, the *BVerfG* needs to ask the CJEU either whether EU law is valid or how the provision of EU law is to be interpreted.

As a *Verfassungsbeschwerde* can be raised not only against Acts of Parliament but against any state action, as long as a violation of fundamental rights is at stake, it offers the widest possibility to initiate a referral to the CJEU. Therefore, especially in connection with Article 38(1) GG, which informally allows a review of the principle of democracy and of the safeguarding of other fundamental principles of the *Grundgesetz*, it has been the basis of some of the most famous decisions of the *BVerfG* on the relationship between the CJEU and the *BVerfG* as well as the *Grundgesetz* and EU law (*Solange II*,<sup>12</sup> *Maastricht*,<sup>13</sup> *Lissabon*,<sup>14</sup> *Honeywell*,<sup>15</sup> *Vorratsdatenspeicherung*,<sup>16</sup> *Antiterrordatei*,<sup>17</sup> *ESM*,<sup>18</sup> and lately *OMT*).

(2) *Abstrakte Normenkontrolle*: an abstract judicial review can only ask the question of whether a German statute conforms to the *Grundgesetz*. Contrary to the practice in some other Member States, international treaties are neither subject of an

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<sup>11</sup> Christian Hillgruber, *Die verfassungsprozessuale Dimension des Outright Monetary Transactions (OMT)-Beschluss des Bundesverfassungsgerichts*, JURISTISCHE ARBEITSBLÄTTER 635, 636 (2014).

<sup>12</sup> 73 BVERFGE 339.

<sup>13</sup> 89 BVERFGE 155.

<sup>14</sup> 123 BVERFGE 267 [hereinafter *Lissabon*].

<sup>15</sup> 126 BVERFGE 286 [hereinafter *Honeywell*].

<sup>16</sup> 125 BVERFGE 260 [hereinafter *Vorratsdatenspeicherung*].

<sup>17</sup> 133 BVERFGE 277 [hereinafter *Antiterrordatei*].

<sup>18</sup> Bundesverfassungsgericht (Federal Constitutional Court) [BVERFG], Mar. 18, 2014, 2 BvR 1390/12, [http://www.bverfg.de/entscheidungen/rs20140318\\_2bvr139012.html](http://www.bverfg.de/entscheidungen/rs20140318_2bvr139012.html).

*abstrakte Normenkontrolle* nor can they be used as a standard of review.<sup>19</sup> A connection to EU law is, however, possible when the statute transposes EU secondary law and either its validity or the margin of discretion for the transposing state is disputed and needs to be clarified in an Article 267 AEUV procedure. Another possibility is the control of an act approving an EU treaty. In this case, the CJEU may be asked to interpret provisions of the TEU or the TFEU under Article 267 AEUV, in order to decide whether the *Bundestag* has transferred too much sovereignty to the EU, rendering the German approval act void.

(3) *Konkrete Normenkontrolle*: a concrete judicial review may be raised by a German court if it considers a German statute unconstitutional and therefore void, and if this unconstitutionality is relevant for the outcome of the case. EU law is at stake if the margin of discretion needs to be determined or if the EU secondary legislation is considered *ultra vires* and therefore not applicable within the EU. It might also influence the standard of review, if the *Grundgesetz* would have to be interpreted in accordance with EU law.

(4) Finally, court proceedings can be filed between governmental bodies (*Organstreit*), either against Acts of Parliament approving an EU treaty or against acts of governmental bodies like the German Central Bank, which participate in actions on an EU level that might be *ultra vires*. In most cases concerning possible referrals, like *Maastricht*, *ESM*, and *OMT*, an *Organstreit* had been initiated by a part of the *Bundestag*, demanding increased participation by the parliament in order to hinder its “disempowerment,” filing for injunctive relief<sup>20</sup> or for political action of the government in EU matters.<sup>21</sup>

As can be seen, in most cases German statutes are reviewed for their compatibility with German fundamental rights and other fundamental state principles like the principle of democracy. The *BVerfG* itself is not competent to decide on matters other than the *Grundgesetz* and acts issued by German state organs. In order to have a situation where a preliminary ruling might become relevant, these actions by German state organs must in some way be determined by EU law. This is the case either when they implement EU law or when they approve the transfer of power to the EU. In the first case, the *BVerfG* needs to know whether the German state actors act within the margin of discretion left by the EU instrument and are therefore still bound by German constitutional law, or whether the EU act is *ultra vires* and must not be applied. In the second case, it needs to know what the EU provisions mean in order to be able to decide whether the *Grundgesetz* allows this transfer of power. In the last resort, however, it only decides on constitutional matters; it does not decide on EU law, nor on questions of statutory law or facts.

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<sup>19</sup> This is the case in Austria and Poland, and Poland, Slovenia and Slovakia respectively. See WIESER, *supra* note 7, 136–37.

<sup>20</sup> *OMT* at para. 1, para. 45; *Lissabon* at para. 336.

<sup>21</sup> *OMT* at para. 1, para. 46.



### C. Discretion of National Courts: The Impact of the Question on the Outcome of the Case

#### *I. "Relevance to the case" (Article 267(1) TFEU)*

From the point of view of EU law, the *BVerfG*, like any other court, can refer questions to the CJEU "if it considers that a decision on the question is necessary to enable it to give judgment" (Article 267(1) TFEU). It is argued that for three reasons this criterion is the key to why and how the *BVerfG* could, for so long, not refer a question to the CJEU.

(1) First, it lies in the discretion of the national courts whether they deem the decision of the CJEU necessary for their own decision. This means, however, that either they can cooperate by using their discretion in an "EU-friendly" way, or that they may consider the question not relevant for the outcome in order to protect their own competence over interpretation. The *BVerfG* has explicitly used this argument in its decision on the Data Retention Directive (*Vorratsdatenspeicherung*).<sup>22</sup> In *OMT* it takes quite a lot of space in order to justify the reference to the CJEU, although the relevance of the question is less than obvious.<sup>23</sup>

(2) Second, the criterion of "relevance" is hardly defined under law or in an objective way.<sup>24</sup> Only when a valid definition has been found will it be possible to state whether the *BVerfG* has in the past misused its discretion. In the *OMT* case it can be argued that the questions were irrelevant because German state organs could not act no matter what the answer by the CJEU was. Even if the CJEU had found a violation of the Treaties there was nothing German state organs could have done to prevent this.<sup>25</sup> Yet, the CJEU, following

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<sup>22</sup> *Vorratsdatenspeicherung* at para. 308. See also *Kampfhunde* at para. 156. If the statute did not conform to EU law, it would be inapplicable within Germany. Hence, a constitutional complaint would be inadmissible, as the statute was non-existent. However, as the statute might violate constitutional law and could therefore be void, a decision by the CJEU on the conformity with EU law would not be necessary (Art. 267(1) TFEU) for the outcome of the case. On the other hand, if the statute conforms to constitutional law, the *BVerfG*—due to its restricted standard of review—cannot rule on the merits of the case as far as the conformity with EU law is concerned, as it does not apply EU law and does therefore not have to answer a question concerning the interpretation of EU law. So, notwithstanding whether the statute conforms to EU law or not, the *BVerfG* cannot make a preliminary reference.

<sup>23</sup> *OMT* at para. 33. See also dissenting opinion by judge Lübbe-Wolff, at paras. 11–14.

<sup>24</sup> For a further analysis, see Eva Julia Lohse, *Die "Entscheidungserheblichkeit" gemäß Art. 267 Abs. 1 AEUV als Instrument des Bundesverfassungsgerichts zur Steuerung von Vorabentscheidungsersuchen*, 4 DER STAAT 633, 647–52 (2014).

<sup>25</sup> See dissenting opinion by judge Lübbe-Wolff, *OMT* at para. 12. Similarly, see Franz C. Mayer, *Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH*, NJW 1999, 2002 (2015).

the Opinion of the Advocate General, has not chosen the way of inadmissibility, stating that the question was not purely fictitious or hypothetical.<sup>26</sup>

As the CJEU claims that preliminary rulings are not tools to raise hypothetical or theoretical questions,<sup>27</sup> and as it does not rule on the requirements of national law, the determination of "relevance" lies solely in the hands of the national courts.

"Relevance" must therefore be defined from the point of view of the pertinent national provisions. Under German constitutional law, the question about the validity of a provision is relevant to the outcome when the case would have been decided differently depending on whether the provision was valid or not. As in the Article 267 TFEU proceedings, the CJEU also adjudicates on the interpretation of primary and secondary EU law, "relevance" needs to be defined more widely: it has to take into account whether the outcome of the case depends on the interpretation of the EU provision in question.

(3) Third, the use or misuse of discretion can hardly be controlled, either from the domestic level or from the Union level. For example, within Germany, the *BVerfG* is the highest court. Unlike rulings by non-constitutional courts, its rulings cannot be reviewed. Control by the CJEU is reduced to "misuse" and to the situation of "wrong referral" (that is, the CJEU can reject a preliminary reference when its decision is not necessary).<sup>28</sup> By contrast, in the situation of a non-referral by a national court, the European Commission would need to initiate an infringement procedure, a measure admissible under EU law, but not used so far given the assumption that enforcement of Article 267(3) TFEU would stunt cooperative behavior by domestic courts.<sup>29</sup>

For the *BVerfG*, the decision of the CJEU is thus relevant either when it directly or indirectly influences the interpretation of a provision in the *Grundgesetz* in accordance with EU law,<sup>30</sup> or when the *BVerfG* needs the CJEU to decide whether the statute brought before the *BVerfG* is determined by EU law in a way that the *Grundgesetz* may not serve as a standard of review. The first situation concerns *ultra vires* acts and such provisions harming

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<sup>26</sup> Case C-62/14, *Gauweiler v. Deutscher Bundestag*, paras. 18–31 (June 16, 2015), <http://cura.europa.eu> [hereinafter *OMT Decision*].

<sup>27</sup> See LUIGI Malferrari, *ZURÜCKWEISUNG VON VORABENTSCHEIDUNGERSUCHEN DURCH DEN EUGH* 163 (2002).

<sup>28</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 488 (2011); Bernhard Wegener, *Art. 267, in EUV/AEUV KOMMENTAR* mar. no. 23 (Christian Calliess & Matthias Rufferteds., 4th ed. 2011; BERNHARD SCHIMA, *DAS VORABENTSCHEIDUNGSVERFAHREN VOR DEM EUGH* 75 (2004).

<sup>29</sup> See also Wegener, *supra* note 28, at mar. no. 34.

<sup>30</sup> See also Rainer Störmer, *Vorabentscheidungsersuchen nach Art. 177 EGV durch Landesverfassungsgerichte*, 52 *NEUE JUSTIZ* 337, 339 (1998) (on the identical question about the restricted standard of review of the constitutional courts of the Lander).

the constitutional identity of the *Grundgesetz*; the second situation concerns constitutional complaints about the violation of German fundamental rights by statutes determined by EU law. All other questions of interpretation, concerning specific questions of EU law, must have been raised by the non-constitutional courts and referred to the CJEU by them. This means that these questions either cannot come before the *BVerfG* or cannot be reviewed by the *BVerfG*, due to its limited standard of review.

## *II. Preliminary Rulings as a Primary Task of Non-Constitutional Courts*

### *1. Exhaustion of all Remedies Before a Constitutional Complaint*

The most commonly used action before the *BVerfG* is the individual constitutional complaint: in 2013 alone, 6477 of 6686 proceedings were *Verfassungsbeschwerden*.<sup>31</sup> This explains why there are so few opportunities for a preliminary reference by the *BVerfG*. Aside from the nature of cases concerning the interpretation or validity of EU law and the restricted jurisdiction of the *BVerfG* in general, under German law all remedies before the non-constitutional courts must be exhausted before an individual constitutional complaint can be filed (§ 90(2) *Bundesverfassungsgerichtsgesetz* (Statute on the organization of the Constitutional Court, henceforth: *BVerfGG*)). Other than the *ultra vires* and "identity" review, the *BVerfG* only reviews German statutory law transposing EU secondary law as a court in the meaning of Article 276(3) TFEU.<sup>32</sup> And even in the case of *ultra vires* review, where the *BVerfG* maintains that a preliminary reference is necessary,<sup>33</sup> usually a non-constitutional court will already have referred the question concerning the validity of the EU law as the basis for its decision to the CJEU.<sup>34</sup> This conforms to the attribution of competences between the *BVerfG* and non-constitutional courts.<sup>35</sup>

Preliminary references are thus left to the courts deciding on non-constitutional matters (*Fachgerichtsbarkeit*). This seems wise, as they will be confronted by specific questions on the interpretation and application of EU law, whereas the *BVerfG* can only rule on the interpretation of the *Grundgesetz*. However, it does not explain why the *BVerfG* did not refer questions about the validity of the *Data Retention Directive* to the (then) ECJ, as in

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<sup>31</sup> See <http://www.bverfg.de/organisation/gb2013/A-I-4.html>.

<sup>32</sup> See Lohse, *supra* note 24, at 6.

<sup>33</sup> *Lissabon* at para. 353; *Honeywell* at 304; *Vorratsdatenspeicherung* at 308; *OMT* at paras. 27–29.

<sup>34</sup> This was the case in *Honeywell* at para. 308, where the *BVerfG* cites Case C–144/04, *Mangold*, 2005 E.C.R. I–9981, paras. 77–78.

<sup>35</sup> Gabriele Britz, *Verfassungsrechtliche Effektivierung des Vorabentscheidungsverfahrens*, *NEUE JURISTISCHE WOCHENSCHRIFT* 1313, 1317 (2012).

this rare case a direct constitutional complaint concerning statutory law had been admissible under Section 90(2) 1 BVerfGG.<sup>36</sup>

## 2. Control of the Non-Constitutional Courts by the BVerfG

Still, the *BVerfG* obviously considers preliminary rulings to be a useful instrument of European integration and a safeguard of EU fundamental rights,<sup>37</sup> as it protects the efficient use of Article 267 TFEU by non-constitutional courts as part of its "cooperation" with the CJEU<sup>38</sup> by a very effective mechanism. First, the CJEU is considered "lawful judge" under Article 101(1) GG (guarantee of the "lawful judge" for every citizen): if a court in the meaning of Article 267(3) TFEU does not refer to the CJEU, the claimant can exact a preliminary ruling by the means of a constitutional complaint.<sup>39</sup> Second, the *BVerfG* only hears references in concrete judicial review (Article 100 GG) about the validity of a German statute implementing EU law if the referring non-constitutional court had referred the questions about the margin of implementation and the goals of the directive, the interpretation of conflicting EU primary law, or the validity of the EU directive to the CJEU.<sup>40</sup>

This keeps the dialogue between courts alive, apart from specifically constitutional questions. At the same time, this may lead to tension whenever the implementation of the preliminary ruling by the non-constitutional court does not conform to German fundamental rights.<sup>41</sup> The unsuccessful party might file a constitutional complaint, claiming that the German court had disregarded his or her fundamental rights. The *BVerfG* would then, save a case of *ultra vires*, have to decide on the EU-consistent interpretation of the *Grundgesetz* and be in a situation where it might refer the question on the interpretation of the pertinent provision in EU law to the CJEU. It can be claimed that constitutional courts should not indirectly review statutory law against the standard of EU law by means

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<sup>36</sup> The same can be said about other proceedings: the prohibition of an "unconstitutional" political party (NPD), while it does also run for elections for the European Parliament (104 BVerfGE 214 (218)). See Franz C. Mayer, *Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof*, EUROPARECHT 239, 254 (2002); a constitutional complaint concerning a German statute on the prohibition of the trade with dangerous dog breeds (*Kampfhunde* at para. 154), see Bergmann, *supra* note 3, at 626; a statute establishing a state monopoly on gambling premises, see *Winner Wetten*.

<sup>37</sup> Britz, *supra* note 35, at 1316.

<sup>38</sup> See also Bergmann, *supra* note 3, at 626.

<sup>39</sup> For example, 82 BVerfGE 159 (195–96); BVerfG, EuGRZ 520 (2004).

<sup>40</sup> Bundesverfassungsgericht (Federal Constitutional Court) [BVerfG], Oct. 4, 2011, Case No. 1 BvL 3/08; see also 85 BVerfGE 191, (203–04) (the non-constitutional court has to decide whether a German statute is inapplicable due to its non-conformity with EU law. If it is not sure, it has to refer the question to the CJEU).

<sup>41</sup> Similarly, GIUSEPPE MARTINICO & ORESTE POLLICINO, *THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS* 80–81 (2012).

of EU-law-consistent interpretation, as it is not their standard of review.<sup>42</sup> Yet, on the other hand, the constitutional court must not apply its domestic standard of review in a way that violates EU law.

In *Winner Wetten*,<sup>43</sup> in any case, the *BVerfG* would have been able to raise the question of whether a transitional period for the nullity of a statute under Section 78 *BVerfGG* was in conformity with Article 4(3) TEU. However, it maintained—formally correct, but not pertinent in this case—that it does not rule on the conformity of statutory law with EU law, and did not even discuss a preliminary reference. It thus required a referral by an administrative court in order to clarify that a transitional period violates EU law.<sup>44</sup>

### *III. Preliminary References and Ultra Vires Acts*

#### *1. A Relationship of Cooperation with the CJEU*

Preliminary references are connected to the *ultra vires* control of EU law. Dating back to the decisions *Solange II* and *Bananenmarktordnung*, and confirmed in *Maastricht*, the *BVerfG* does not hear constitutional complaints on violations of German fundamental rights by secondary EU law as long as the standard of protection within EU law is comparable to that under German law and as long as those acts are not *ultra vires*, meaning that the EU has respected their attribution of competences in the Treaties. More recent case law confirms that an *ultra vires* act does not need to be applied by German public bodies, as do such acts violating the "identity" of the *Grundgesetz*, that is, the "immutable" and hence "integration-safe" core of the German constitution as guaranteed by Article 23(1) in connection with Article 79(3) GG.<sup>45</sup>

The assumed competence of a domestic court to review EU law against the standard of Article 5(1) TEU ("limited attribution of powers") or the immutable core of the domestic constitution (Article 79(3) GG) poses legal problems: the supremacy of EU law, its uniform application, and the exclusive competence of the CJEU to set aside secondary law, a competence stemming from Articles 263 and 267 TFEU. Stressing its "friendliness" towards EU law (*Europarechtsfreundlichkeit*), the *BVerfG* uses the tool of preliminary references to protect the cooperation with the CJEU, which is vested with a capacity to interpret EU law in the last resort (Article 19 TEU and Article 267 TFEU). An EU act can only be declared *ultra*

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<sup>42</sup> See Störmer, *supra* note 30, at 340.

<sup>43</sup> *Winner Wetten* at 298.

<sup>44</sup> Case C-409/06, *Winner Wetten*, 2010 E.C.R. I-8015, paras. 59–61.

<sup>45</sup> *Lissabon* at 353; *Honeywell* at 301–03; *Vorratsdatenspeicherung* at 307; *OMT* at para. 22.

*vires*, or a violation of the "identity" of the *Grundgesetz* be stated by the *BVerfG*,<sup>46</sup> if a preliminary ruling on the question has been sought.<sup>47</sup> The latter can, obviously, be effectuated by the *BVerfG* or—according to the attribution of powers—by a non-constitutional court.

## 2. Non-Determination of Implementing Domestic Law by Ultra Vires Acts

As the claim of *ultra vires* can be used by individual complainants to obtain a decision on the conformity of implementation acts with the *Grundgesetz*, it offers judicial protection against German statutes determined by EU law.<sup>48</sup> Commonly, the *BVerfG* does not review statutory law implementing EU secondary law, as it would otherwise indirectly render EU law subject to the *Grundgesetz*. If the secondary act is *ultra vires*, though, supreme EU law no longer determines German statutory law, which can therefore be measured against the standard of the *Grundgesetz*. This requires a preliminary reference, which, surprisingly, the *BVerfG* rejected in the decision on the Data Retention Directive. It considered the question of the validity of the Directive to be irrelevant to the issue, because the Directive allowed for a margin of implementation, which could have been used in conformity with the *Grundgesetz*.<sup>49</sup>

Apparently, the *BVerfG* did not want to initiate a preliminary reference, as one could very well argue that it had no capacity to decide on the limits of the margin, and on whether an implementation in accordance with fundamental rights would also conform to the goals of the Directive. Unlike the decision in *Honeywell*,<sup>50</sup> which concerned litigation between private parties before the labor courts, in the case of the Data Retention Directive and its implementation by the *Telekommunikationsgesetz* (Act on Telecommunication), a diffuse review of EU law by a non-constitutional court<sup>51</sup> had not been effectuated, as there are no remedies against acts of Parliament before the non-constitutional courts. Consequently, whereas the denial of another reference in *Honeywell* was correct, in the case of the Data

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<sup>46</sup> Walter, *supra* note 4, at 184. Jurisdiction in these matters lies solely with the *BVerfG*. See Günter Hirsch, *Europäischer Gerichtshof und Bundesverfassungsgericht – Kooperation oder Konfrontation?*, NJW 2457, 2461 (1996).

<sup>47</sup> *Honeywell* at 303; *Lissabon* at 354 (about the "EU-friendliness" and—simultaneously—the power of the *BVerfG* to decide in the last resort on *ultra-vires*-acts and on safeguarding the "identity" of the *Grundgesetz* in the course of European integration). "Identity-control" also requires a preliminary reference. See *OMT* at para. 27; see also Franz C. Mayer & Maya Walter, *Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss*, JURA 532, 540–41 (2011).

<sup>48</sup> *Vorratsdatenspeicherung* at 306–07; *Honeywell* at 299.

<sup>49</sup> *Vorratsdatenspeicherung* at 308–09.

<sup>50</sup> *Honeywell* at 304.

<sup>51</sup> For the term of "diffuse control of norms" (*diffuse Normenkontrolle*), see WIESER, *supra* note 7, at 121–24.

Retention Directive it appears that extra-legal and political reasons have presumably played a role in the reluctance of the *BVerfG* to refer.

#### *IV. Shielding Fundamental Rights from European Influences?*

According to *Solange II*, *Bananenmarktordnung*, and *Maastricht*, the *BVerfG* accepts the EU standard of protection of fundamental rights and sees no need to review EU secondary law or German statutes determined by EU law as long as the standard of protection in general is equivalent to that of the *Grundgesetz*. Yet, *in concreto* it does not seem to trust this standard of protection. In cases concerning fundamental rights, the *BVerfG* seemingly tries to shield the fundamental rights of the *Grundgesetz* and their (assumed) higher level of protection from the influences of the EChFR.

Formally, German fundamental rights apply as a standard of review<sup>52</sup> when either the statute is not determined by EU law or when the determining EU act is void. As only the CJEU can define the scope and validity of EU law,<sup>53</sup> in both cases the *BVerfG* would have to make a preliminary reference and would not be able to decide on these questions autonomously.

Likewise, the *BVerfG* cannot review statutory law against the standard of the EChFR. However, when Article 51(1) EChFR applies, it means that all state bodies are bound by supreme EU law and that even fundamental rights in the domestic constitutions have to be interpreted in accordance with the EChFR. Although Article 53 EChFR safeguards a higher standard of protection in the Member States, thus far it remains unclear how the CJEU would interpret this provision when the correct implementation of a directive is at stake.<sup>54</sup> The *BVerfG* seems not to want to take the risk of a prevailing duty to implement drawn from Article 288 TFEU or other treaty provisions. Unlike constitutional courts like the

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<sup>52</sup> Similarly, Bergmann, *supra* note 3, at 626; Mayer, *supra* note 36, at 245.

<sup>53</sup> The standards in *CILFIT* (Case 283/81, 1982 E.C.R. 3415), *Zuckerfabrik Süderdithmarschen* (Case C-143/88, 1991 E.C.R. I-415), and *Foto Frost* (Case 314/85, 1987 E.C.R. 4199, para. 11) do also apply to the *BVerfG*. It has, however, never made clear whether it considers itself as a court of last instance in the meaning of Art. 267(3) TFEU or as a court simply permitted, but not obliged to refer, as it does not perceive itself as a court of instance, but a specialized constitutional court (see Mayer, *supra* note 36, at 250–51). As, on the other hand, it has recurred to the principles laid down in *CILFIT* (*id.* at para. 16) and to the doctrine of *acte clair* in *BVerfG*, 2 BvR 2/13 et al., Decision of 26 February 2014 (3%-Threshold), [www.bverfg.de/entscheidungen](http://www.bverfg.de/entscheidungen), paras. 40–44, and *Antiterrordatei* at para. 90, it seems to justify a deviation from the obligation to refer under TFEU Article 267(3). See also Feige, *supra* note 9, at 534.

<sup>54</sup> But see Case C-399/11, *Melloni*, *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* (EuZW) 305, 308 (2013), paras. 55 ff., which gives rise to doubts, whether higher national standards can persist against supreme EU law despite the wording of Art. 53 EChFR.

Austrian *Verfassungsgerichtshof* (Constitutional Court)<sup>55</sup> the *BVerfG* thus does not try to mold the European legal order by preliminary rulings on Article 52(4) EChFR or specific European fundamental rights, but rather declares the question to be outside the scope of EU law. In order to do so, it uses two different causes: the “non-relevance” of EU law for the outcome of the case, implicitly stating that German constitutional law suffices to resolve the case, and the use of “*acte clair*,” saying that the interpretation of EU law is so obvious that a referral is not needed.

### 1. The Verdict of “Non-Relevance” of EU Law

The most prominent example of this approach is the decision on the Data Retention Directive, where a reference concerning the validity of the Directive seemed to be called for considering the unsatisfying ruling in *Ireland v. European Parliament*<sup>56</sup> and given that it was one of the rare cases where there was no non-constitutional court able to refer. The claimants had explicitly asked for a preliminary reference in order to quash the directive and obtain a full review of the statute under the *Grundgesetz*.<sup>57</sup> The *BVerfG* simply declared the validity of the Directive as not “relevant” to the case, as the directive allowed for an implementation in conformity with the *Grundgesetz* and it was only the German Parliament that had chosen the “wrong” implementation.<sup>58</sup> It could therefore easily apply its perceived higher standard of Articles 2(1), 1(1) GG on “informational self-determination” and “data protection”. Now that the decision in the *Seitlinger* case has been rendered, one may doubt whether the perception of higher domestic standards was correct: whereas the *BVerfG* only found the concrete implementation by the *Bundestag* to be in breach of Articles 2(1), 1(1) GG, the CJEU declared data retention in general to be illegal.<sup>59</sup> A reference would have clarified this at an earlier stage, and would have contributed to the protection of fundamental rights at the EU level.

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<sup>55</sup> Case C-594/12, *Seitlinger*, 2013 7-80J C 79, preliminary question 2.4. The AG has determined these questions as being unimportant, as long as a breach of EU fundamental rights can be stated (Opinion of Advocate General Cruz Villalón at para.29, Joint Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd./Minister for Communications, Marine and Natural Resources and Seitlinger*, (Apr. 8, 2014), <http://curia.europa.eu/>). In its ruling on 8 April 2014, the CJEU likewise did not answer these questions as it found the directive to be in non-conformity with the EChFR (*Digital Rights Ireland*, Joint Cases C-293/12 and C-594/12, at para. 72).

<sup>56</sup> Case C-301/06, *Ireland/Parliament and Council*, 2009 E.C.R. I-593, para. 57.

<sup>57</sup> *Vorratsdatenspeicherung* at 307.

<sup>58</sup> *Id.* at 309.

<sup>59</sup> See also Alexander Roßnagel, *Neue Maßstäbe für den Datenschutz in Europa – Folgerungen aus dem EuGH-Urteil zur Vorratsdatenspeicherung*, MULTIMEDIA UND RECHT 372, 375 (2014); Jürgen Kühling, *Der Fall der Vorratsdatenspeicherungsrichtlinie und der Aufstieg des EuGH zum Grundrechtsgericht*, NVwZ 681, 685 (2014); Heinrich Amadeus Wolff, *Anmerkung zum Urteil des Europäischen Gerichtshofs vom 8.4.2014 zur Vorratsdatenspeicherung*, DIE ÖFFENTLICHE VERWALTUNG 608, 609 (2014).



Nonetheless, this reluctance in matters of fundamental rights also becomes evident in other cases. For example, in the decision on trade with dangerous dog breeds,<sup>60</sup> the *BVerfG* shielded its favored interpretation of the freedom to own property (Article 14 GG) and of profession (Article 12 GG) and the principle of equality (Article 3 GG) from an interpretation in the light of the EU freedom of movement of goods under Article 34 TFEU by implicitly declaring the question to be irrelevant to the outcome of the case. And in *Winner Wetten*, it ruled that even if state monopolies for lotteries breached EU fundamental freedoms, and would therefore be inapplicable due to the supremacy of EU law, the *BVerfG* may exclusively rule on the conformity of state monopolies with the *Grundgesetz*.<sup>61</sup> An inapplicable statute is still a lawful restriction of domestic fundamental rights, and an answer of the CJEU was, once again, not necessary.

## 2. Interpretation of EU Law as *Acte Clair*

In the most recent case on the thresholds required for the entry of political parties into the European Parliament, the *BVerfG* refers to the doctrine of *acte clair* in order to refrain from making a preliminary reference in the context of a restriction on the freedom to vote and the equality of political parties (Articles 38(1) and 3 GG) in favor of the functioning of the European Parliament.<sup>62</sup>

Finally, in *Antiterrordatei*, the *BVerfG* had to determine whether a German statute on the collection of data of terror suspects would fall under the scope of Article 51(1) ECHR. The *BVerfG* considered it *acte clair* that the German statute did not "implement" EU law, because it neither transposed a directive, nor was there any other obligation under EU law demanding or prohibiting such a database.<sup>63</sup> Considering the excessive interpretation of "implementation" in *Åkerberg Fransson*,<sup>64</sup> the *BVerfG* clearly protects the exclusive applicability of German fundamental rights. Furthermore, it refrains from making a preliminary reference, because – according to its own case-law – it would only have to refer if it was an *ultra vires* act or a violation of the identity of the *Grundgesetz*. By not referring, it insinuates that the CJEU did not mean what it decided in *Åkerberg Fransson*. At the same time, cooperation between courts is identified as separation of the realms of domestic and EU fundamental rights.<sup>65</sup> Implicitly, again, it claims the question of EU fundamental rights not to be relevant to the decision, as they are not applicable anyway.

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<sup>60</sup> *Kampfhunde* at 156.

<sup>61</sup> *Winner Wetten* at 299.

<sup>62</sup> *3%-Threshold* at paras. 40–44.

<sup>63</sup> *Antiterrordatei* para. 90.

<sup>64</sup> Case C–617/10, *Åkerberg Fransson*, NVwZ 561, 562–63 (2013), para. 20.

<sup>65</sup> Tobias Kubicki, *Akerberg Fransson*, DELUXE 4–5 (2013).

### 2.1 OMT—A Special Situation?

After the referral in *OMT*, the situation seemed to have changed. The reasons for non-referrals seemed to have vanished into thin air, and the *BVerfG* was apparently willing to refer and to seek advice from the CJEU. Nonetheless, some aspects shed doubt on the initial euphoria about this "historical decision."<sup>66</sup>

#### a) The Facts of the Case

The *OMT* case was a constitutional complaint as well as an *Organstreit* between the *Bundestag* (Parliament) and the parliamentary group *Die LINKE*, concerning the question of whether the approving act of the *Bundestag* for government bonds bought by the ECB in secondary sovereign bond markets would be void, as well as whether the government and/or the *Bundestag* had breached their duties under the constitution by not preventing the decision of the Council of Ministers of the EU on OMT. The legal problem was that:

(1) The EU has no competence to regulate questions of financial and economic policy of the Member States, and the ECB is therefore restricted to actions on monetary policy by Articles 119, 123, and 127 ff. TFEU. As the purchase of government bonds on the secondary market in order to stabilize the domestic economies of those Euro Countries in crisis could be interpreted as a means of economic policy, the claimants argued that there had been an unlawful transfer of sovereign power to the EU by the German government and an act *ultra vires*.

(2) As the risk of Germany's liability could not be excluded if the bonds failed, the OMTs were also *ultra vires* as they amounted to a "union of liabilities" not provided for by the monetary union of Euro Countries. The *BVerfG* should therefore establish a violation of Article 38(1) GG as well as of Article 23(1) in connection with Article 79(3) GG, thus a breach of the identity of the *Grundgesetz* and an unlawful transfer of competences to the EU, leading to a duty on German state organs to refrain from such actions and, furthermore, to an obligation to act in favor of an abolition of the Council Decisions on OMT at EU level, for example by filing an action of nullity (Article 263 TFEU).

#### b) The Reasoning Behind the Referral

The *BVerfG* referred the question primarily not because the interpretation of Union law was relevant for its own interpretation of the *Grundgesetz*. Rather, it was true to its own standards as set out in *Honeywell* and other decisions. It asked the question on the competences of the ECB for Outright Monetary Transactions and on the interpretation of

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<sup>66</sup> Christoph Herrmann, *Luxemburg, wir haben ein Problem!*, EuZW 161 (2014); Ukrow, *supra* note 1, at 121–22; rather skeptical Udo Di Fabio, *Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107 (2014).

Articles 119, 123, and 127 ff. TFEU by the CJEU, with this being the first time when a transgression of competences by an EU body other than the CJEU appeared clearly palpable and had not been subject to a ruling by a non-constitutional court. For the first time, the seemingly high barrier to assume an *ultra vires* act (the transgression of competences being "blatant" and "structurally important", in the words of the *BVerfG*) had been overstepped in the (reasoned) opinion of the *BVerfG*.<sup>67</sup> Whether or not there will be a second time remains to be seen.

Thus, unlike in the above-mentioned situations, the *BVerfG* considered a decision by the CJEU to be relevant to its own decision; for if the ECB had acted *ultra vires*, the Bundestag and the Bundesbank were to be inhibited from participating in such actions and were to take political measures to prevent such acts in the future.<sup>68</sup> The *BVerfG* maintained that it had the power to adjudicate both on the legal consequences of an action *ultra vires* for German governmental bodies, and on whether the identity of the *Grundgesetz* had been breached by the transfer of powers that enabled such an act by the ECB, even though it had not acted *ultra vires*.<sup>69</sup> Still, the question remains of whether there had not been better occasions in the past for making a referral, which would have strengthened the aspects of "cooperation" and "unity of EU law".<sup>70</sup> This considered, there may be no "wind of change" in the halls of Karlsruhe.

Nonetheless one must remark that on the one hand, the *BVerfG* has no capacity to rule on the political consequences for governmental bodies, and, on the other hand, a constitutional complaint is only an instrument to claim positive state action, where the *Grundgesetz* positively and concretely mandates such action.<sup>71</sup> The *BVerfG* would have had good reason to declare the complaints inadmissible,<sup>72</sup> and the fact that it did not do so can only be interpreted as a political action taken to exact a decision from the CJEU to show that fundamental principles, not only of national constitutional law but also of EU law, matter, even in times of financial crisis.<sup>73</sup>

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<sup>67</sup> Di Fabio, *supra* note 66, at 108.

<sup>68</sup> *OMT* at para. 44. Thereby the situation sketched in MAYER & WALTER, *supra* note 47, at 541 has apparently materialized.

<sup>69</sup> *OMT* at paras. 102–03, 39.

<sup>70</sup> Similar Di Fabio, *supra* note 66, at 107; René Brosius-Linke, *Die Vorlageentscheidung des Bundesverfassungsgerichts*, DÖV 612, 613 (2014); Matthias Wendel, *Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH*, ZaöRV 615, 618 (2014); Herrmann, *supra* note 66, at 161.

<sup>71</sup> See dissenting opinion by Judge Lübbe-Wolff, *OMT* at paras. 17–24.

<sup>72</sup> See also Matthias Ruffert, *Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm*, JURISTISCHE SCHULUNG 373, 374 (2014); Hillgruber, *supra* note 11, at 638.

<sup>73</sup> Sebastian Müller-Franken, *Anmerkung zu Vereinbarkeit des Ankaufs von Staatsanleihen durch EZB mit EU-Recht—Vorlage an den EuGH*, NVwZ 514, 515 (2014); from the point of view of domestic law, see Hillgruber,

It is interesting to see that the CJEU does not reject the preliminary reference by using a "strict" standard<sup>74</sup> and claiming a hypothetical question, because the *BVerfG* cannot decide on the merits of the case.<sup>75</sup> A hypothetical question is posed when the answer does not contribute to the decision. This was claimed by several other Member States in the oral proceedings, but the CJEU maintains that there is a presumption of relevance of the case which had not been rebutted.<sup>76</sup>

The consequences for German constitutional law and procedure of the CJEU's decision on the merits of the case remain unclear. Still, the *BVerfG* is not entitled under German procedural law to directly oblige German state organs to act or to refrain from acting. It may only, in the course of a *Verfassungsbeschwerde*, declare a violation of a fundamental right. Therefore, it needs an "exit strategy" for the case at hand that the CJEU does not follow its interpretation of Union Law.<sup>77</sup> So far, the *BVerfG* has not enunciated the inevitable in case of an *ultra vires* act or a violation of the identity of the *Grundgesetz*: it would be either a modification of the EU Treaties in order to allow for such action by the ECB thereby eliminating the perceived lack of competence by the EU, or a modification of the *Grundgesetz* in the limits of Article 79(3) GG in order to accommodate the "new" competences of the ECB, or—as a last resort if neither of the above can be done and thus the *ultra vires* act persists—exit from the EU or at least the Eurogroup.<sup>78</sup> Maybe the *BVerfG* will also modify its standard of review for *ultra vires* acts, using the claim simply as a possibility for individual claimants to exact a preliminary ruling before the CJEU.<sup>79</sup>

Irrespective of the reaction of the CJEU in this particular case, both the difficulties of constitutional procedural law and the apparent willingness of the *BVerfG* to overcome them for the sake of safeguarding fundamental principles of German constitutional law,

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*supra* note 11, at 638. Whether this will be successful can be doubted looking at the Opinion of Advocate General Pedro Cruz Villalón, Case C-62/14, *Peter Gauweiler v. Deutscher Bundestag* (Jan. 14, 2015), <http://curia.europa.eu/>. He does not state a breach of the TFEU as long as the ECB manages to perform OMTs under conditions where the ECB respects the requirement of transparent reasoning and of proportionality and finds mechanisms to safeguard the conditions of free markets even when purchasing bonds on a secondary market.

<sup>74</sup> See Malferrari, *supra* note 27, at 182; Schima, *supra* note 28, at 76 (general or hypothetical question or no connection to the issue at stake).

<sup>75</sup> Differently Ruffert, *supra* note 72, at 374.

<sup>76</sup> *OMT Decision* at paras. 18–31.

<sup>77</sup> Wendel, *supra* note 70, at 668; Ruffert, *supra* note 72, at 375; Herrmann, *supra* note 66, at 162.

<sup>78</sup> See on a similar decision by the Polish constitutional court Ziller, *supra* note 4, at 97. Very clearly, Ukrow, *supra* note 1, at 135–39.

<sup>79</sup> This is suggested by Mayer, *supra* note 25, at 2002.

like the principle of democracy, show that there may only be a second time when the high threshold of *ultra vires* is again reached by a special measure in special times of crisis. It is valuable that a constitutional court shoulders the control of legality of acts by EU organs where governments and parliaments were apparently unable to do so out of various reasons and does not remain silent. But it must also be stated that the referral is not necessarily meant to contribute to the "unity of Union law" as envisaged by Article 267 TFEU.

### C. Conclusions

To conclude, it seems safe to state that the *BVerfG* remains reluctant to refer. Although Germany is often said to have no doctrines of "judicial activism" and "judicial self-restraint" in political matters, this is not true when it comes to the decisions of the *BVerfG* in matters pertaining to the EU. Whereas there are clearly many situations where a reference by a non-constitutional court has been necessary due to procedural law, there remain specific instances in which only the *BVerfG* could have referred the question, but instead interpreted "relevance to the case" in a way that enabled non-referral for extra-legal reasons. This could also be named "judicial passivity". The only referral so far shows that the *BVerfG* can also interpret the criterion of "relevance" very widely, in order to ask questions on EU competences where this is politically intended. Neither situation represents a contribution to the development of European law and integration.

Nonetheless, one can legitimately ask whether references by constitutional courts are crucial in reaching the goals of preliminary rulings: Neither the unity of European law nor effective legal protection of the individual against violations of his or her fundamental rights seem to be in danger, as most of the relevant cases come before non-constitutional courts in any case. Yet, as the saga of the Data Protection Directive illustrates, it is just those few other cases that could make history—if there was a true cooperation between the courts.

## The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference

By *Miryam Rodríguez-Izquierdo Serrano* \*

### A. Introduction: The Preliminary Reference Procedure and Fundamental Rights Adjudication

The purpose of the preliminary reference procedure is to ensure a uniform application and interpretation of Community law across all the Member States, including European fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union. The entry into force of the Charter has reinforced the authority of the Court of Justice of the European Union (CJEU) in the field of fundamental rights adjudication. But the Charter may also be a new source of conflicts between the jurisdiction of the CJEU and the jurisdiction of national constitutional courts. Indeed, compliance with the indirect rulings over national law contained in the CJEU decisions became something logical for the national ordinary courts from the beginning of the integration process,<sup>1</sup> but it was not the same for national constitutional courts. Most of them have always disliked the idea of asking for the CJEU's opinion on a conflict of law involving national constitutional provisions.<sup>2</sup> The CJEU succeeded in establishing a legal doctrine through principles of Community law—supremacy and direct effect being the pioneers—that meant a material

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<sup>1</sup> Joseph H. H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26(4) COMP. POL. STUD. 510, 515 (1994).

<sup>2</sup> Even though, as Cruz Villalón explains, "National Constitutional Courts have made a valuable effort at understanding and assuming the European integration dynamics without forgetting their particular commitment: *domestic* constitutional review." See PEDRO CRUZ VILLALÓN, *LA CONSTITUCIÓN INÉDITA* 67 (2004). Italics come from the original Spanish text.

constitutionalization of the European Union (EU) law system.<sup>3</sup> And for the national constitutional courts, such an understanding of EU law made a rival of the CJEU.

Fundamental rights adjudication has, therefore, been a controversial issue between national constitutional courts and the CJEU, especially since the *Solange I* ruling of the German Constitutional Court and the *Granital* ruling of the Italian Constitutional Court.<sup>4</sup> Both rulings are crucial to explain that mystic concept of *judicial dialogue*: a sort of unofficial way of communication between national high courts and the CJEU. This *judicial dialogue* unofficially took the place that the preliminary reference should have had in the relation between the CJEU and the national constitutional courts, as long as those high courts were, in general, so unwilling to accept that they should ask for a prior ruling from another court before taking a decision.<sup>5</sup>

Of course, not all Constitutional Courts have been equally reluctant to submit preliminary references to the CJEU,<sup>6</sup> but the Spanish Constitutional Court (SCC) was historically in that reluctant group since Spain's accession to the European Communities in 1986. The SCC was not especially argumentative in its refusal to acknowledge CJEU authority, but simply ignored it for as long as it could. The SCC certainly admitted that EU law principles were compatible with the Spanish Constitution (SC),<sup>7</sup> but it also made clear that EU law was none of its business, arguing that it was not a constitutional issue. Judicial dialogue seemed

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<sup>3</sup> See Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 27 AM. J. INT'L L. 1 (1981); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

<sup>4</sup> There is a wide variety of works relating to the reactions of the German and Italian Constitutional Courts to the doctrine of integration through law developed by the CJEU. See Juliane Kokott, *Report on Germany*, in THE EUROPEAN COURT AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77 (Anne-Marie Slaughter, Alec Stone Sweet, & Joseph H. H. Weiler eds. 1998); Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in THE EUROPEAN COURT AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 133 (Anne-Marie Slaughter, Alec Stone Sweet, & Joseph H. H. Weiler eds. 1998).

<sup>5</sup> See GIUSEPPE DE VERGOTTINI, *OLTRE IL DIALOGO TRA LE CORTI: GIUDICI, DIRITTO STRANIERO, COMPARAZIONE* 62 (2010).

<sup>6</sup> Even the harder opponents of the CJEU jurisdiction have gradually changed their attitude. In the early days of the judicial dialogue, with the *Solange* and *Granital* rulings, it would have been unthinkable that either the German or the Italian Constitutional Court submitted a preliminary reference to the CJEU, but they have both finally yielded, acknowledging the CJEU's authority over EU law issues. While we were working on this paper for the conference in memory of Gabriella Angiulli, the German *Bundesverfassungsgericht* (Federal Constitutional Court) made a preliminary reference to the CJEU, in February 2014. The Italian Constitutional Court had historically been very reluctant to make a reference due to primacy issues, but it finally submitted preliminary references in 2008. Even the French *Conseil Constitutionnel* did so in 2013. The Belgian Constitutional Court, former *Cour d'Arbitrage*, began to submit preliminary references in 1997, the Austrian *Verfassungsgerichtshof* in 1999. The Lithuanian Constitutional Court did it in 2007, only three years after the incorporation of Lithuania to the EU.

<sup>7</sup> SCC Declarations 1/1992 of 1 July and 1/2004 of 13 December. The first one made a previous constitutional review to the Maastricht Treaty. The second one did the same with the Constitutional Treaty.

to be unnecessary for the SCC. Only in 2011 did its attitude seemingly change, when it raised a preliminary reference to the CJEU. This was the famous *Melloni* case, involving an Italian citizen who had been convicted *in absentia* by an Italian court and was about to be sent back to that country through the execution of a European Arrest Warrant. The possibility of a collision between the constitutional right to a fair trial and the obligation of the Spanish ordinary courts under EU law to execute a European Arrest Warrant led the SCC to send its first preliminary ruling to the CJEU.<sup>8</sup> For the first time, EU law became something of constitutional concern and it was not a coincidence that fundamental rights were involved.

Fundamental rights adjudication is at the heart of the unsettled issue of the attitude of the SCC towards the preliminary reference procedure. In order to explain this, a study of the *Melloni* case, including the final ruling of the SCC in February 2014<sup>9</sup> and its precedents, will lead the first part of this analysis (B). After that, in the second part of this article we will discuss the following paradox: that the initial reluctance of the SCC to recognize the constitutional nature of some conflicts of EU law, as well as its refusal to raise preliminary references to the CJEU, could be eroding the authority of the SCC as the supreme interpreter of constitutional rights (C).<sup>10</sup> In other words, disregarding controversies in which EU rules and fundamental rights as enshrined in the Charter are involved is not the best choice for the SCC to keep its leading role in fundamental rights adjudication.<sup>11</sup>

### **B. The Spanish Constitutional Court and the Preliminary Reference Procedure: From Zero to *Melloni***

As earlier remarked, the SCC never liked the idea of making preliminary references to the CJEU. For the SCC, EU law was out of its jurisdiction. That was all. To understand this attitude of the SCC, and how it evolved from zero to *Melloni*, we need to start by analyzing the links between the SCC jurisdiction and EU law.

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<sup>8</sup> Case C-399/11, *Melloni*, 2013 E.C.R. 2013.

<sup>9</sup> S.T.S., Feb. 13, 2014 (No. 26).

<sup>10</sup> See Pablo J. Martín Rodríguez, *Tribunal Constitucional—Sentencia 26/2014, de 13 de febrero, en el recurso de amparo 6922-2008 promovido por Don Stefano Melloni*, 48 REVISTA DE DERECHO COMUNITARIO EUROPEO 603, 605 (2014).

<sup>11</sup> So it is suggested in the interesting proposal of Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, & Maja Smrkolj, *Reverse Solange—Protecting the essence of fundamental rights against EU Member States*, 49.2 COMMON MKT. L. REV. 489 (2012).



*I. The Jurisdiction of the Spanish Constitutional Court and European Union Law*

It must be said that the old and silent refusal of the SCC to cooperate with the CJEU through the preliminary reference procedure was not just a product of the stubbornness of the SCC, but also a consequence of the position of the Constitutional Court in the Spanish legal and institutional system. As is well known, the SCC is not part of the Judicial Branch, so its functions are not directly related to the application of EU law.<sup>12</sup> According to the provisions of the SC, the SCC has no jurisdiction over EU law aside from the constitutional review of international treaties established in Article 95 SC. Indeed, the SCC can be committed either by the Government or by the Chambers of Parliament to review the constitutionality of European Treaties that may contain stipulations contrary to the Constitution. That has happened twice: before the ratification of the Treaty of the European Union in 1992 and before the ratification of the European Union Constitutional Treaty in 2004.<sup>13</sup>

Article 95 SC could have been a means for connecting the SCC to EU law. But things are not so simple and in fact there are many situations in which the Constitutional Court can face a controversy in which EU law is at stake.

In the first place, as in the case of some other European Constitutional Courts, the SCC has a function of protecting the fundamental rights of individuals. This is established in Articles 53(2) and 161(1)(b) SC. This procedure of individual appeals against violations of fundamental rights (known as “*amparo*”) is connected with regular judicial processes. In general,<sup>14</sup> the appellant can only raise an *amparo* to the SCC after having submitted his claim in all the previous judicial stages without success. It is through this procedure that an individual appeal for protection against violation of fundamental rights related to EU law can be made to the SCC: if some rule of EU law is involved in a case previously submitted to an ordinary court and if one of the parties finds that their fundamental rights have been disregarded by the ordinary courts, the SCC would face a controversy in which the interpretation of EU law might be necessary to give judgment. And that is precisely what Article 267 of the Treaty on the Functioning of the European Union (TFEU) is made for.

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<sup>12</sup> See Gil Carlos Rodríguez Iglesias & Alejandro del Valle Gálvez, *El derecho comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de los Derechos Humanos y los Tribunales Constitucionales nacionales*, 2 REVISTA DE DERECHO COMUNITARIO EUROPEO 329, 354 (1997).

<sup>13</sup> See, *supra* note 7.

<sup>14</sup> Article 53.2 of the SC establishes that the individual appeal to the SCC should be a subsidiary procedure to protect fundamental rights. The initial claims should be submitted to the courts of the Judicial Branch. The only exception is made in Article 42 of the General Act of the Constitutional Court in relation to the resolutions of the Parliament which have no legal force and that might violate a fundamental right. In that case, the appeal can be directly submitted to the SCC.

In the second place, the SCC might face a conflict involving EU law in connection with the constitutional review of an act of the Spanish Parliament. Why not? In practice, it is not so easy to draw the limits between constitutional and legal interpretation that are set out in theory. And sometimes legal interpretation of an act of the *Cortes Generales* (Parliament) involves or requires an interpretation of EU law. The constitutional review of an act of the Parliament that implements a Directive is a good example.<sup>15</sup> Following Article 163 SC, this can even happen as a consequence of a previous controversy before the courts, as long as Article 163 SC allows and compels Spanish judges to raise constitutional references to the SCC whenever they may have doubts regarding the constitutional conformity of an act of the Parliament that has to be applied to rule over a case. By this means, the SCC could face a controversy involving the application of EU law. As we will see, this is what happened in Judgment 28/1991 of 14 February.

## *II. The Spanish Constitutional Court and European Union Law: A Permanent Divorce*

*Melloni* was not the first case in which the SCC had to make a decision involving EU law. It was only the first case in which the SCC acknowledged that the CJEU ruling was necessary to solve the controversy and that it was up to the SCC to raise it. From 1986, the date of Spanish accession to the Communities, to 2011, the date of the *Melloni* preliminary reference, the arguments made by the SCC to avoid the jurisdiction of the CJEU were based on the following reasoning: EU law is not a constitutional issue.

The argument of the non-constitutional relevance of EU law was settled in the SCC Judgment 28/1991 of 14 February. It was the first time that the SCC had faced a case involving EU law. A constitutional reference of Article 163 SC had been brought to the SCC. It was a controversy relating to the interpretation of a Decision of the European Council regarding the election of the members of the European Parliament. It was necessary to clarify whether an elected member of the European Parliament could also be a member of the Basque Parliament. The Basque Parliament claimed that a preliminary reference should be issued, but the SCC declared that it was up to the ordinary judge, and not itself, to submit such a reference to the CJEU. Following the Judgment 28/1991, the only way for the SCC to get involved in interpreting EU law would be if fundamental rights as enshrined in the Spanish Constitution were at stake. The argument that EU law was not a constitutional issue had made its first appearance;<sup>16</sup> and so also had the hypothetical exception regarding fundamental rights adjudication.

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<sup>15</sup> As the *Bundesverfassungsgericht* did with the Data Retention Directive and the Telecommunications Act in a Decision (1 BvR 1299/05), Judgment of 24 January 2012. Nevertheless, the SCC had never been willing to analyze conflicts of this kind. See MIGUEL AZPITARTE SÁNCHEZ, EL TRIBUNAL CONSTITUCIONAL ANTE EL CONTROL DEL DERECHO COMUNITARIO DERIVADO 46 (2002).

<sup>16</sup> S.T.S. Feb. 14, 1991 (No. 28). See CARLOS VIDAL PRADO, EL IMPACTO DEL NUEVO DERECHO EUROPEO EN LOS TRIBUNALES CONSTITUCIONALES 183 (2004).

During the twenty years between 1991 and 2011, the attitude of the Constitutional Court towards EU law and the preliminary reference procedure was steady.<sup>17</sup> This steadiness was reflective not only of stubbornness, but also of the position of the SCC in the Spanish constitutional system, being a logical outcome of its commitment to the Constitution and not to EU law. The SCC always emphasized that it was for the ordinary courts, and not itself, to lay down the facts of a controversy and to apply the laws, including EU law.<sup>18</sup> This included the possible submission of preliminary references to the CJEU.

Regarding fundamental rights adjudication within the Spanish constitutional system, the SCC always tried to confine itself within the limits of constitutional interpretation, especially when facing appeals against judgments of ordinary courts through the *amparo* procedure. The purpose of the SCC was to avoid conflicts with the Judicial Branch, but also to make clear that it had the last word on fundamental rights interpretation. We could say that there has always been a sort of subliminal tension between the SCC and the ordinary courts regarding fundamental rights adjudication, as the SCC has the power to overrule the decisions of ordinary courts in order to protect individuals against violations of fundamental rights.

By contrast, the SCC's perception of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) was completely different. It differed both from its perception of EU Law and from its relationship with fundamental rights interpretation by the Spanish ordinary courts. The reason for this was a concrete constitutional clause regarding the interpretation of fundamental rights in conformity with international treaties. Indeed, Article 10(2) SC establishes that "provisions related to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain." The ECHR was directly related to the functions of the SCC, in particular as regards fundamental rights interpretation. From the same point of view, even though for the SCC EU law and CJEU preliminary rulings would not be related with constitutional adjudication, the SCC could have to consider them as long as a controversy could be connected to EU law and fundamental rights interpretation. That is the reason why, also according to Article 10(2) SC, the SCC began to use some rules of EU law and some of the CJEU preliminary rulings as interpretive criteria in cases in which fundamental rights adjudication was at stake and EU law was directly or indirectly

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<sup>17</sup> See Luis María Díez Picazo, *El derecho comunitario en la jurisprudencia constitucional española*, 54 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 255, 260 (1998); Fernando Álvarez-Ossorio Micheo, *Cuestión de inconstitucionalidad y derecho de la Unión Europea: El Tribunal Constitucional como juez «ad quo»*. *El caso español*, in RECURSO DE AMPARO, DERECHOS FUNDAMENTALES Y TRASCENDENCIA CONSTITUCIONAL 116, 127 (José María Morales Arroyo ed., 2014).

<sup>18</sup> JAVIER PÉREZ ROYO, TRIBUNAL CONSTITUCIONAL Y DIVISIÓN DE PODERES 103 (1988).

involved. Judgment 130/1995 of 11 September was the first case in which the SCC acknowledged that EU law had an interpretive role regarding fundamental rights, and Judgment 292/2000 of 30 November connected this role with the constitutional mandate in Article 10(2). Since then, the SCC has repeated the same argument in several rulings relating to equality and non-discrimination as understood by the CJEU case law.<sup>19</sup>

Notwithstanding this particularity connected to fundamental rights interpretation, the self-rule about the non-constitutional dimension of EU law was not overruled, and it rather allowed the SCC to stay on the sidelines of conflicts involving EU law. Such conflicts were resolved as was necessary, but without the unwanted assistance of the CJEU, or, in other words, without making preliminary references. The rule of separation between constitutional law and EU law was rigidly applied. Even when an ordinary court refused to make a preliminary reference to the CJEU, and there was a subsequent appeal against the violation of the fundamental right to a fair trial and to obtain the effective protection of the courts, the SCC considered that such a refusal to make a preliminary reference did not mean an infringement of Article 24 SC (the right to a fair trial). For the SCC, the preliminary reference was not a guarantee of the Spanish Constitution, and so it did not need to be safeguarded by the Constitutional Court in an *amparo* procedure.<sup>20</sup>

These last arguments changed in 2004, when feeble exceptions to the non-constitutional dimension of EU law began to be admitted by the SCC. In its Judgment 58/2004 of 19 April, the SCC unexpectedly declared that an ordinary court's judgment was void because a preliminary reference had not been made to the CJEU. The court hearing the case had found that an act of the Spanish parliament regulating taxation issues was contrary to EU law. Following the primacy rule, the national law had been set aside in order to preserve the European mandate. The SCC considered, however, that for the ordinary court to make such a decision, either a preliminary reference to the CJEU or a constitutional reference to the SCC through Article 163 SC would have been required.<sup>21</sup> The SCC found a violation of the right to due process of law (Article 24(2) SC), and the judgment of the ordinary court was overruled accordingly.

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<sup>19</sup> S.T.S., Dec. 20, 1999 (No. 240); S.T.S., Mar. 14, 2013 (No. 61); S.T.S., Apr. 8, 2013 (No. 71); S.T.S., June 18, 2013 (No. 116). See JAVIER PÉREZ ROYO AND MANUEL CARRASCO DURÁN, *CURSO DE DERECHO CONSTITUCIONAL* 872 (2014).

<sup>20</sup> Díez Picazo suggests that this argument is similar to the one that has been usually given by the SCC to appellants who considered that a refusal by the judges to raise a constitutional reference to the SCC (Art. 163 SC) was a violation of the right to effective protection by the courts (Art. 24 SC). Only the reasons are different for EU law, as the SCC always stated that the preliminary reference procedure was none of its business. See Díez Picazo, *supra* note 17, at 262.

<sup>21</sup> Note that, in this case, the SCC also meant to protect the fundamental concept of the submission of the judges to the acts of the Parliament, which does not allow them to set aside the national laws without the review of the Constitutional Court. See Paloma Biglino Campos, *La primacía del Derecho comunitario: la perspectiva española*, 3 *REVISTA GENERAL DE DERECHO EUROPEO* 10 (2007).

That 2004 ruling of the SCC meant a new understanding of European law by the SCC case law and a first exception to its former doctrine. Its arguments were repeated in SCC Judgment 194/2006 of 19 June and SCC Judgment 78/2010 of 20 October. These rulings both shed lights and shadows on this new doctrine and specified its effects. In both cases, the controversy was about the conformity of an act of the parliament of the Canary Islands regulating a particular tax for that territory with the European directive for tax harmonization. The peripheral territory of the Canary Islands was excluded from the scope of application of the tax harmonization Directive, so the SCC declared that a preliminary reference was not necessary and that Article 24(2) SC was not affected. EU law was not really at stake, but it was the SCC itself that checked it, disregarding its former doctrine about its lack of jurisdiction over EU law issues, but also avoiding a preliminary reference to the CJEU.<sup>22</sup>

Finally, in 2011, the SCC made the *Melloni* reference. After that reference, but prior to the *Melloni* SCC ruling in 2014, there were two other important decisions by the SCC relating to EU law. The first was in 2012, when the SCC ruled that the refusal of an ordinary court to apply a CJEU decision was contrary to the right to a fair trial enshrined in Article 24 SC. Indeed, the CJEU had previously found that the Spanish law establishing a penalty was contrary to EU law, but, after that, a Spanish court had ignored the primacy of EU law and had applied such penalties to Iberdrola, a Spanish energy company. This decision, SCC Judgment 145/2012 of 30 July, was praised for its new understanding of the relationship between constitutional adjudication and EU law.<sup>23</sup> It seemed to leave behind the old doctrine of the non-constitutional relevance of EU law.

The second important decision of the SCC was Judgment 27/2013 of 11 February. There, the SCC stated that the refusal of the Spanish Supreme Court to make a preliminary reference according to the *Cilfit* doctrine<sup>24</sup> was not an infringement of Article 24(2) SC, but not because of the existence of the *Cilfit* doctrine, but because there was no Spanish law that had to be set aside according to the primacy rule. If we compare this decision with SCC Judgments 194/2006 and 78/2010, we can deduce that the SCC might be more interested

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<sup>22</sup> In particular, SCC Judgment 194/2006 of June 19 was strongly criticized by the experts because of its ambiguity. See Ricardo Alonso García, *Cuestión prejudicial europea y tutela judicial efectiva (a propósito de las SSTCC 54/2004, 194/2006 y 78/2010)*, 38 CUADERNOS DE DERECHO PÚBLICO 11, 19 (2009).

<sup>23</sup> Daniel Sarmiento, *Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law: Tribunal Constitucional*, 50.3 COMMON MKT. L. REV., 875 (2013).

<sup>24</sup> The *Cilfit* doctrine makes reference to the *acte clair* doctrine which sets the criteria for when national courts are not obliged to make a preliminary reference to the CJEU about the matter of interpretation of EU law. Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, 1982 E.C.R. 1982.

in preserving the application of national laws than in the conformity of the behavior of ordinary courts towards the preliminary reference procedure.<sup>25</sup>

To sum up, we can say that from 2004 onwards, the attitude of the SCC towards EU law changed, but that it did not change radically. Following the SCC Judgment 58/2004, some constitutional law scholars suggested that the SCC was closer to accepting the submission of preliminary references to the CJEU. They argued that this might happen when a violation of a fundamental right occurred as a consequence of the application of a rule of EU law, and in particular if the infringed fundamental right was of special relevance in the EU law system.<sup>26</sup> That was precisely what happened in *Melloni*: The European Arrest Warrant, a rule of EU law, had to be applied; the right of defense and to a fair trial, as established in the Framework Decision, in Articles 47 and 48 of the Charter, and in Article 24.2 SC, was at stake; doubts about the meaning and validity of the provisions of EU law acquired an indirect constitutional significance, insofar as they contributed to delimiting the scope of the right recognized in Article 24(2) SC.<sup>27</sup>

### *III. The Charter of Fundamental Rights and the Melloni Preliminary Reference*

Was it a coincidence that the SCC made its first preliminary reference following the entry into force of the Charter in 2009? We think it was not. The Charter confers a new dimension on the role of the CJEU as human rights adjudicator, and the constitutional courts of the Member States, including the Spanish one, have understood it. As was earlier explained, the SCC is bound to interpret fundamental rights according to the ECHR doctrine because of the mandate of Article 10(2) SC. Now that the EU has a Charter of Rights, the SCC is also bound to interpret the fundamental rights of the Charter according to the CJEU doctrine thereon. But that is not all. When EU law and the Charter are involved, the SCC is obliged to respect the standards of protection of rights set out in the Charter, as interpreted by the CJEU. This is a consequence of the mandate of Article 93 SC, which allowed the transfer of competences derived from the Constitution to the EU through the European Treaties. EU law can no longer be considered to be a non-constitutional issue by the SCC; and the SCC's disregard towards EU law may have come to an end with this first preliminary reference in *Melloni*.<sup>28</sup>

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<sup>25</sup> This is the point of view of Joaquín Huelin Martínez de Velasco, *La cuestión prejudicial europea. Facultad/Obligación de plantearla*, LA CUESTIÓN PREJUDICIAL EUROPEA, IV EUROPEAN INKLINGS 44, 54 (2014).

<sup>26</sup> VIDAL PRADO, *supra* note 16, at 188.

<sup>27</sup> And that constitutional relevance, related with the scope of protection of a fundamental right, made the SCC preliminary reference consistent with its former arguments about the relationship between EU law and its own jurisdiction. Luis Arroyo Giménez, *Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional. Base, contenido y consecuencias*, 8 WORKING PAPERS ON EUROPEAN LAW AND REGIONAL INTEGRATION 15 (2011).

<sup>28</sup> See, *supra* note 8.

When the SCC delivered its Order 86/2011 of 9 of June, making the preliminary reference, both the Charter and a 2009 Amendment to the European Arrest Warrant Framework Decision had just come into force. The Amendment included some specifications about trials *in absentia* which were relevant to the *Melloni* case. As a precedent, the SCC had delivered a controversial ruling in a similar case in which the execution of a European Arrest Warrant (EAW) was also at stake. SCC Judgment 199/2009 of 28 of September was the case of a Romanian citizen who had been convicted by default in his country and sent back there by an Order of the Spanish National High Court. His lawyers appealed and the SCC declared that the Order of the Spanish National High Court was contrary to Article 24(2) of the SC and void. As the Romanian citizen was already back in his country, the SCC ruling did not affect the EAW application, but dissenting opinions with arguments about the EU law implications of the case were delivered by several SCC justices. With such precedents, and with all the normative changes that have been explained, the preliminary reference was not a complete surprise when Stefano Melloni appealed to the SCC.

Although the facts and legal arguments of the *Melloni* reference are well known, we will summarize them succinctly. The conflict was related to Framework Decision 202/584/JHA of 13 of June 2002 on the EAW and connected to the fundamental rights to defense and to a fair trial set out in Articles 24(2) SC and 47 and 48(2) of the Charter. Stefano Melloni was an Italian citizen who had received an extradition order to Italy in 1996. That first extradition order was executed by the Spanish National High Court, but Melloni escaped and never returned to Italy, hence he was still in Spain in 2008, when a court in Ferrara issued an arrest warrant to bring him back to Italy, where he had been convicted by default. The arrest warrant was implemented by the Spanish National High Court in 2008, at which point Melloni appealed to the SCC through the process of individual appeals established for the protection of fundamental rights in Article 161(1)(b) SC.

In previous rulings, the SCC had declared that as a conviction by default entailed a violation of Article 24(2) SC (the right to a process with all due guarantees), such a conviction in a foreign court could justify a refusal to implement an extradition order in Spain. The reasoning behind this was that the execution of the extradition order would amount to an indirect violation of a fundamental right enshrined in the Spanish Constitution. But an arrest warrant issued by an Italian court in Ferrara meant that *Melloni* was not a typical case of extradition, for EU law was involved. The SCC needed to know whether Articles 47 and 48(2) of the Charter could be interpreted as preventing the implementation of an arrest warrant when the convict had been sentenced by default in the European country issuing the arrest warrant. If the answer to this question was to be that these provisions of the Charter did not prevent the implementation of the arrest warrant, then, bearing in mind Article 53 of the Charter, the SCC would need to establish which standard of protection to apply to the case: either the higher one set out in the SC (under Article 24), or the standard of the Charter.

To the first question, the CJEU answered that Articles 47 and 48(2) of the Charter did not prevent the implementation of an arrest warrant when the convict had been sentenced by default. In the opinion of the CJEU, the standard of protection of the fundamental right of defense was the result of a common decision of the Member States contained in the Framework Decision—which certainly allowed the implementation of the arrest warrant in such circumstances. To the second question, the CJEU answered that such a common standard of protection would not affect a higher standard of protection in any Member State *out of* the scope of application of EU law.

The *Melloni* precedent has been of great interest in the academic context, because it has meant a first interpretation of the controversial Articles 51 and 53 of the Charter regarding the scopes and levels of fundamental rights protection. But above all, *Melloni* has been of great importance for the two Courts involved, the CJEU and the SCC. Together with the *Åkerberg Fransson* ruling,<sup>29</sup> for the CJEU these cases have turned out to be landmark ones. Through them, the CJEU has sketched out the scope of application of the Charter when a Member State applies EU law—something that Article 51(1) of the Charter leaves open to interpretation. And following Article 53 of the Charter, the CJEU has also settled some principles for the differentiation between standards of protection of fundamental rights: the EU standard, the standards of the Member States, and the ECHR standard.<sup>30</sup> For the SCC, this first preliminary reference meant a long-awaited and a very necessary acknowledgment of the constitutional dimension of some issues of EU law, leading many scholars to think that the SCC had finally decided to play an active role in the integration-through-law process.

But these expectations were frustrated when the SCC's final *Melloni* decision was delivered on 13 February 2014. The ruling disappointed many scholars, who consider that the SCC has not been able to accept the ultimate consequences of the ruling of the CJEU.<sup>31</sup> On the contrary, some opinions blame the CJEU for the reaction of the SCC, arguing that the SCC considered itself forced to follow the CJEU's interpretation and that the CJEU was so bold in its ruling because the SCC was an embattled constitutional court, which was "pretty much in competition with ordinary Spanish courts" rather than with the ECJ.<sup>32</sup> These last

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<sup>29</sup> Case C-617/10, *Åkerberg Fransson* (February 26, 2013), <http://curia.europa.eu/>.

<sup>30</sup> Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50(5) COMMON MARKET L. REV., 1267, 1288 (2013); Pedro Tenorio Sánchez, *Diálogo entre tribunales y protección de los derechos en el ámbito europeo*, 31 REVISTA GENERAL DE DERECHO EUROPEO 16 (2013).

<sup>31</sup> The sentence also disappointed three justices of the SCC who delivered concurrent opinions. Critics of the SCC ruling can be found in Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10.2 EUR. CONST. L. REV. 308, 330 (2014). See also Rodríguez, *supra* note 10, at 605.

<sup>32</sup> Leonard F. M. Besselink, *The Parameters of Constitutional Conflict after Melloni*, 4 EUR. L. REV. 531, 551–52 (2014).



ideas remind us of the debate about the Czech Constitutional Court following the CJEU *Landtová* ruling. Perhaps this is not the first time that the CJEU has forgotten to pay attention to the national circumstances of some judicial controversies.<sup>33</sup>

From our point of view, the legal reasoning of the SCC uses Article 10(2) SC to put the Charter rights at the same level as the ECHR rights, and to give the rulings of the CJEU the same efficacy as the rulings of the ECtHR when the constitutional position of EU law is different from the constitutional position of the ECHR rights. Indeed, the SCC has appealed to Article 10(2) SC to integrate the CJEU ruling into its own decision, instead of founding its decision on the transfer of competences made effective through Article 93 SC. And instead of treating Articles 47 and 48(2) of the Charter as the relevant rules to decide the controversy, the SCC has used Article 24(2) SC. Finally, the SCC has reinterpreted the scope of protection of this constitutional right in accordance with the CJEU ruling but, as a result, this new interpretation of Article 24(2) SC is somehow in contradiction with Article 53 of the Charter, which declares that the standards of protection of the constitutional rights of the Member States should not be adversely affected by the coming into force of the Charter.<sup>34</sup> As explained, the SCC had always said that a conviction by default could justify the denial of an extradition order, because it would be contrary to Article 24(2) SC. Only if the conviction by default could be reviewed in the country issuing the extradition order could the Article 24(2) SC guarantees be deemed to be respected. In its *Melloni* ruling, the SCC has changed this doctrine, by ruling that Article 24(2) SC must henceforth be interpreted according to both the doctrine of the ECHR and the doctrine of the CJEU regarding Article 10(2) SC. This mandate of interpretation allows a Spanish court to execute any extradition order, and not only an arrest warrant, if the convicted has at least the representation of an attorney. Somehow, then, the guarantees of Article 24(2) have shrunk, meaning that the interpretation of the rights of defendants under the Spanish Constitution have narrowed.<sup>35</sup>

Three of the twelve justices of the SCC issued dissenting opinions to this *Melloni* ruling. They considered that the Charter rights are of a compelling—and not merely interpretative—nature when EU law is involved. They argued that the *Melloni* decision of

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<sup>33</sup> Case C-399/09, *Marie Landtová v. Česká správa sociálního zabezpečení*, 2011 E.C.R. I-05573. See Ricardo Alonso García, *Guardar las formas en Luxemburgo*, 28 REVISTA GENERAL DE DERECHO EUROPEO (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959 (2013).

<sup>34</sup> Article 53: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

<sup>35</sup> BESSELINK, *supra* note 32, at 533.

the CJEU was directly related to the case, so the SCC, acting as European court, should have applied the CJEU decision instead of unnecessarily reinterpreting Article 24(2) SC.<sup>36</sup> And we agree with them. From our point of view, there should be a deeper change in the SCC understanding of a preliminary reference procedure when the scope of application of EU law and the Charter rights are involved. The interpretation of the Charter by the CJEU has only just begun to update the sphere of individual fundamental rights. The Constitutional Courts, in particular the SCC, should be aware and willing to play their role in this process of innovation.

### **C. The Spanish Constitutional Court and Fundamental Rights Adjudication within the Scope of Application of EU Law**

Aside from *Melloni*, and as long as we have only one preliminary reference from the SCC to talk about, we cannot establish a comparison or a deeper analysis of the judicial dialogue between the CJEU and the SCC regarding fundamental rights adjudication. What we can do is a review of some situations that show a distance between the case law of both courts, and from this we can try to prove the convenience that would be presented by a more fluent dialogue between them through the preliminary reference procedure.

#### *1. Right to Equality and Non-Discrimination: Agreements and Disagreements*

As has already been explained, the SCC had already appealed to the CJEU case law to solve some controversies in which the right to equality and non-discrimination was at stake. Article 10(2) SC allowed the SCC to follow the CJEU doctrine on equality and non-discrimination without having to accept the constitutional relevance of EU law. Through its Judgment 130/1995, mentioned above, the SCC declared that a Moroccan citizen who had been working in Spain could not be excluded from unemployment benefit because of a European Regulation that prohibited discrimination between EU citizens and Moroccan citizens regarding social security benefits. The SCC also appealed to EU law and CJEU case law in its Judgment 292/2000 to declare that the rules relating to the social security benefits that discriminated against part-time workers were contrary to the equality principle enshrined in the SC and in EU law.<sup>37</sup> The same argument was held by the SCC—

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<sup>36</sup> S.T.S., Feb. 13, 2014 (No. 26). The arguments related to the interpretation of the CJEU ruling through Art. 10.2 SC are in para. 3 of the judgment. Justice Asua Batarrita criticizes such arguments in para. 1 of her dissenting opinion: “[T]he judgment of the Court avoids the central issues [related to the function and protection of the rights of the Charter]. Instead, it holds to a previous constitutional doctrine through which the Court had repeated that European law is not a constitutional issue, that the SCC has not the function of guaranteeing the application of Union law and that European law would only be relevant regarding article 10.2 SC, this is, in relation with the interpretation of the scope of application of the constitutional fundamental rights.” The Judgment has not been published in the Official Gazette yet, but it can be consulted on the SCC website.

<sup>37</sup> Arguments repeated by the SCC in its Judgments 253/2004, 61/2013, 71/2013 and 116/2013.

240/1999—for a female public employee who was demanding leave to look after her children.<sup>38</sup>

But some contradictions between the CJEU and the SCC doctrines on this fundamental right to equality and non-discrimination were also detected. For example, there were particular CJEU judgments on equality and non-discrimination which slightly contradicted the SCC doctrine thereon. As an example, in *Cordero Alonso v. Fondo de Garantía Salarial*, the CJEU stated that the supremacy of EU law was at stake even though the SCC had previously ruled over the constitutional conformity of a national rule that happened to be applicable to a case before the CJEU. The SCC conception of Article 14 SC (the right to equality) was in slight contradiction with the right to equality as developed in EU law. And, in such a situation, EU law interpretation was to prevail even if it contradicted a previous SCC ruling. This same argument was repeated by the CJEU in 2010 when it delivered its ruling on *Francisco Javier Rosado Santana v. Consejería de Justicia y Administración Pública de la Junta de Andalucía*.<sup>39</sup>

This kind of misunderstanding between the CJEU and the SCC in relation to fundamental rights adjudication is not convenient. Furthermore, the entry into force of the Charter could lead to more disagreements between the courts if the SCC does not use the preliminary reference procedure as a logical mechanism of collaboration with the CJEU. The interpretation of the Charter rights by the CJEU has a direct impact on the interpretation of the SC rights, as the *Melloni* case makes clear. The CJEU has ultimate authority over the interpretation of Charter rights whenever EU law is at stake, regardless of the national court involved in the particular controversy. And the SCC has ultimate authority over the rights set out in the Constitution, including the margin of appreciation, acknowledged by the ECHR, and the national standards, acknowledged by the Charter. If the SCC refuses to establish a dialogue with the CJEU on fundamental rights standards, its ultimate authority will be eroded, because the ordinary courts will assume the leading role in that task. The case of data protection is an example of this.

## *II. Data Protection: A Bit of Disregard*

Data protection is a fundamental right enshrined in Article 18(4) SC. Since its early decisions on Article 18(4), the SCC has stated that protection of personal data is not only a guarantee for privacy and reputation (as set out in the wording of Article 18(4)), but a

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<sup>38</sup> See *supra* note 19.

<sup>39</sup> Case C-81/05, *Cordero Alonso v Fondo de Garantía Salarial (Fogasa)*, 2006 E.C.R. I-07569. See Fernando Álvarez-Ossorio Micheo, *El sistema multinivel de protección de Derechos Fundamentales. Un análisis desde la Carta de Derechos Fundamentales de la Unión Europea*, in *LA UNIÓN EUROPEA EN PERSPECTIVA CONSTITUCIONAL* 113, 118 (Ana M. Carmona Contreras ed., 2008). See also Case C-177/10, *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía*, 2011 E.C.R. I-07907.

separate fundamental right with its own particular features.<sup>40</sup> Notwithstanding these statements, the SCC doctrine on data protection has always been somewhat confusing, connecting, as it does, infringements of protection of personal data with infringements of privacy or of the right to personal image, both of which are established in Article 18(1) SC. As these rights almost always absorb the Article 18(4) right, the SCC has never identified the particular European features of data protection and it has never turned to the CJEU case law on this right.<sup>41</sup>

On the one hand, following the SCC doctrine, EU law was not a constitutional issue while data protection was just a constitutional one, even though Directive 95/46/EC regulated data protection for all Member States. On the other hand, although the SCC was bound to interpret fundamental rights in accordance with international Treaties ratified by Spain (under Article 10(2) SC), protection of personal data was not considered to be a fundamental right in any international Treaty other than the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Number 108 of the Council of Europe. For all these reasons, the SCC doctrine never paid attention either to the European dimension of data protection or to the CJEU case law. Only in some decisions—and only as one argument among others—did the SCC indirectly mention the European origins of data protection. Moreover, in some decisions, the SCC mentioned this fact so as to refuse the constitutional dimension of the Directive on data protection,<sup>42</sup> in keeping with its well-known doctrine about the non-constitutional relevance of EU law.

On several occasions, the SCC has also refused to submit preliminary references on data protection issues. The first one came in a controversy relating to the implementation by the Spanish Government of the tax identification number. The appellants argued that such identification numbers were contrary to the right to privacy and the right to protection of personal data under the Spanish Constitution. They also asked the SCC to make a

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<sup>40</sup> See SCC Judgment 254/1993 of 20 July, the very first case about protection of personal data decided by the SCC.

<sup>41</sup> See as examples SCC Judgments 11/1998 of 13 January; 202/1999 of 8 November; 144/1999 of 22 July or 159/2009 of 29 June. The exception could be SCC Judgment 29/2013 of 11 February, in which the pictures of an employee recorded by a security camera were not treated as right to personal image, but as right to protection of personal data. The relationship between privacy and personal data as fundamental rights in the Spanish constitutional doctrine is studied in PABLO LUCAS MURILLO DE LA CUEVA, *EL DERECHO A LA AUTODETERMINACIÓN INFORMATIVA: LA PROTECCIÓN DE LOS DATOS PERSONALES FRENTE AL USO DE LA INFORMÁTICA* 26 (1990); Francesc de Carreras Serra, *El derecho fundamental a la protección de datos personales*, in *LOS NUEVOS DERECHOS FUNDAMENTALES* 65, 69 (2007); or EMILIO GUICHOT REINA, *DATOS PERSONALES Y ADMINISTRACIÓN PÚBLICA* 164 (2005).

<sup>42</sup> The Directive was obviously taken into account in SCC Judgment 292/2000 of 30 November, in which the SCC had to decide about the constitutionality of General Act 15/1999 of 13 December. In other decisions, the SCC had just mentioned the Directive indirectly and together with a reference to the Covenant 108 of the Council of Europe. See as examples SCC Judgments 202/1999 of 8 November and 79/2009 of 23 March. In its Judgment 29/2013 of 11 February, the SCC only mentions the Directive after having made reference to the General Act and to the regulations which implement it in the Spanish system of law.

preliminary reference to the CJEU, as they found that some EU law principles were involved, namely those linked to protection of reputation and privacy and some others relating to certainty and the rule of the law. Directive 95/46/EC and the Charter had not yet been issued, and so the SCC replied to these arguments that there were no specific regulations in EU law at that moment against which to interpret the rights of the Constitution regarding Article 10(2) SC. The Court also made its well-known argument that EU law was not the object of its jurisdiction. Consequently, the petition of the appellants to make a preliminary reference was deemed inadmissible.<sup>43</sup>

Some years later, the SCC had a new opportunity to consider submitting a preliminary reference in relation to data protection. An appellant to the SCC argued that the inclusion of his personal data in a catholic baptism register was contrary to his right to protection of personal data. He had formerly applied for the erasure of his data from the record, but had received a negative answer. For the Spanish Supreme Court, as these books of baptisms were not considered a *filing system*, the appellant's claim could not be considered an infringement of his right to protection of personal data.<sup>44</sup> This argument was in fact an interpretation of the scope of application of the Directive. A justice of the Spanish Supreme Court delivered a dissenting opinion arguing that a preliminary reference should be made to the CJEU in relation to the conflict.<sup>45</sup> However, neither the Supreme Court nor the Constitutional Court made the preliminary reference. The SCC affirmed the decision of the Supreme Court through its Order 20/2011 of 28 of February, disregarding the possibility of a reference and notwithstanding the important issues related to the scope of application of the Directive and its connection to the right to protection of personal data. In contrast with the former case about the tax identification number, the Charter was already in force when this case was raised to the SCC. And, as a matter of fact, the SCC had even to interpret the provisions of the General Law of Protection of Personal Data,<sup>46</sup> meaning that it had to interpret the Directive and, consequently, to rule on the application of EU law. On the one hand, the doctrines of direct and indirect effect of EU law are accurate in such controversies, meaning that disregarding the Directive could have meant an infringement of the Treaty. On the other hand, the SCC was in fact interpreting EU law – something that the SCC itself considered to fall outside its jurisdiction. Too many contradictions were left unresolved.

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<sup>43</sup> S.T.S., May 9, 1994 (No. 143). Anyway, Díez Picazo considers that it would have been absurd to send a preliminary reference on this issue, as the Directive had not been enacted yet. Díez PICAZO, *supra* note 17, at 262.

<sup>44</sup> T.S. Sept. 19, 2008 (Sec. 3).

<sup>45</sup> The same opinion is in Pedro Tenorio Sánchez, *Tribunal Constitucional y Cuestión Prejudicial ante el Tribunal de Justicia de la Unión Europea*, 7520 DIARIO LA LEY 1 (2010).

<sup>46</sup> Another example is SCC Judgment 96/2012 of 12 June, a very interesting case about disclosure of personal data to a third party in preliminary proceedings in the course of a private law action.

In the aftermath of the entry into force of the Treaty of Lisbon, the situation is different. Article 8 of the Charter declares that the protection of personal data is an EU fundamental right; the TFEU includes, in Article 16, a legal basis to regulate this right within the scope of EU law; the European Commission has proposed a General Data Protection Regulation;<sup>47</sup> and Spanish ordinary courts have submitted several preliminary references to the CJEU relating to data protection. In 2010, shortly after the entry into force of the Charter, the Spanish Supreme Court submitted two preliminary references to the CJEU relating to the interpretation of the Directive and the balancing of the rights to privacy and protection of personal data.<sup>48</sup> In 2011, it was the National High Court that made a preliminary reference of particular interest, *Google Spain*, not only concerning data protection, but also the fundamental rights to freedom of expression and information. The ruling of the CJEU, delivered in May 2014,<sup>49</sup> deduced a new right to be forgotten from Articles 7 (privacy) and 8 (data protection) of the Charter. Consequently, search engines such as Google are required to remove, upon request by a data subject, certain information from the list of results displayed when introducing that data subject's name. In granting this right to be forgotten, the CJEU held that the right to privacy will outweigh both the interests of internet users, their right to obtain information, and Google's economic interest. This is a fairly bold statement, in acknowledging the primacy of the privacy right over freedom of information and freedom to conduct a business.<sup>50</sup> It is a concrete result of a balancing of rights which could be extended to similar conflicts and give rise to a general doctrine.

The preliminary reference in this case has set a precedent that would be very difficult to object to if the SCC happens to face a similar controversy. It contains an extensive interpretation of the right to protection of personal data and a balancing between that

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<sup>47</sup> COM (2012) 11 final of 25 January 2012, Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). The Commission's draft and the information about the legislative procedure can be found in Pre-Lex database (<http://ec.europa.eu/prelex/apcnet.cfm?CL=es>).

<sup>48</sup> Joined Cases C-468/10 and C-469/10, *Asnef and Fecemd*, 2011 E.C.R. I-12181.

<sup>49</sup> Case C-131/12, *Google Spain v. AEPD*, (May 13, 2014), <http://curia.europa.eu/>. The case involved a Spanish citizen, Mario Costeja, who contacted Google with the following demand: each time his name and surnames were entered in the search engine, a link to a newspaper of 1998 appeared and he wanted that link to be erased. The information in question was a note about a real-estate auction connected with attachment proceedings prompted by social security debts. The data subject, Costeja, was mentioned as the owner of the real-estate. All the information was true and it came from an official source, so no objection could be made in relation to the newspaper publication, covered by the exception of Article 9 of the Directive in relation to journalistic purposes. But the data subject argued that the particular proceedings recounted in the newspaper had been concluded years before and were not of relevance or public interest in 2010. The fact that his name appeared connected to that ancient judicial process affected his fundamental rights, in particular his right to reputation in connection with his right to protection of personal data, so he claimed a right to be forgotten to be included as a consequence of Art. 8 ECFR. This case was crucial in defining balancing criteria in a really up-to-date conflict of fundamental rights.

<sup>50</sup> Hannah Crowther, *Google v. Spain: Is There a Right to be Forgotten?*, 9 J. INTELL. PROP. L. & PRAC. 892, 893 (2014).

right and those rights relating to freedom of expression and electronic communications. In the light of such a ruling, and following the SCC's own doctrine in *Melloni*, the SCC has no choice but to take into account the CJEU criteria. Article 10(2) of the SC compels it to do so. Moreover, it seems that the ultimate arbiter in conflicts of this kind will be the CJEU, and that the ordinary courts will be the counterparts in the judicial dialogue.<sup>51</sup> If the SCC is left out of this, its authority as the ultimate guarantor of fundamental rights within the Spanish system will be in danger.

#### D. Final Considerations

The SCC would be wise to take an active role in the development of the standards of protection of the Charter rights. These standards will, of course, be drawn up by the CJEU, but the preliminary reference procedure will be the instrument for defining such standards, and the SCC should take part in this task. Issuing a single preliminary reference, as the SCC has done with *Melloni*, will not be enough; the interpretation made by the SCC of the CJEU *Melloni* rule is not enough. The *Melloni* reference could have led to the beginning of a new relationship between the SCC and the CJEU, but such a relationship is still a long way off. The entry into force of the Charter is a very important landmark and the SCC should take advantage of the new situation. Given the shared competence between both Courts on fundamental rights adjudication, the SCC might need the CJEU opinion on matters regarding some fundamental rights, especially those which are, remarkably, within the scope of competence of EU law as well as within the scope of protection of the Spanish Constitution. Cooperation is the best choice for the SCC.

Indeed, the SCC would be best understanding that following the CJEU ruling in a preliminary reference related to the interpretation of the Charter, when EU law is directly involved, is never going to weaken its role as ultimate guarantor of fundamental rights. On the contrary, the SCC should consider the Charter as a new field for the definition of the European citizen's fundamental rights and it should find its role in such a task.<sup>52</sup> If the SCC does not accept this role, some other national courts will. And then the role of the SCC as ultimate guarantor of fundamental rights *will* be weakened, and the preliminary reference procedure will be the main cause for its weakening.

Since 1980, the SCC case law has been a crucial element in the implementation of a doctrine of fundamental rights in Spain. After forty years of an authoritarian regime, a

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<sup>51</sup> We make reference to the article of Mattias Kumm in which he suggests that there should not be a final arbiter, but rather collaboration between the CJEU and the Constitutional Courts, in particular the German one, in a pluralist conception of European constitutionalism. See Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?*, 36 COMMON MKT. L. REV., 351 (1999).

<sup>52</sup> Sarmiento, *supra* note 30, at 1299. The identification of the rights of the Charter with European citizenship is analyzed in VON BOGDANDY, *supra* note 11.

fundamental rights doctrine was something new and a challenge for the Spanish judiciary. The SCC has also been very active in the implementation of the ECHR doctrine in Spain. References to the ECHR case law, which are mandatory through Article 10(2) SC, became usual in the SCC judgments and the Spanish courts and judges have learned to use those references to protect fundamental rights. As has been explained in this article, the SCC, through its case law, has also reinforced the obligation of the ordinary courts to make preliminary references to the CJEU when a national rule could be set aside as a consequence of the application of the primacy principle. Finally, in a sentence delivered after *Melloni*, SCC Judgment 50/2014 of 14 April, the SCC declared that the case law of the CJEU has to be taken into account by ordinary courts when ruling over controversies in which some judgment of that court could be relevant and applicable to a case. The SCC here acknowledges that the fundamental rights to a fair trial would be damaged if ordinary courts refused to follow the CJEU applicable rulings. The SCC has succeeded in all these challenges, but now it has a new one in relation to the definition of EU fundamental rights in connection with the fundamental rights of the Spanish Constitution.

Further arguments can be made in support of these considerations. When the culture of fundamental rights was already settled in Spain, the General Act of the Constitutional Court was amended. This happened in 2007. The amendments were made with the purpose, *inter alia*, of reducing the vast volume of individual appeals against violations of fundamental rights. The idea was that the SCC would only admit individual appeals of special constitutional relevance: cases that presented new situations regarding the comprehension of a fundamental right; cases that made it necessary to review the doctrine about a particular fundamental right; and cases in which the SCC doctrine had been completely ignored by the courts. From 2007, it would be up to the Judicial Branch to protect fundamental rights, following the doctrine that the SCC had already settled, with the SCC only ruling on specific cases of singular constitutional relevance. Any case involving the interpretation of Charter rights has, undeniably, constitutional relevance, and so also does any case involving the conformity of the ruling of an ordinary court with the CJEU case law. Indeed, the SCC confirmed this in its aforementioned judgment 50/2014 of 14 April. The SCC should not dare to interpret EU Charter rights when EU law is involved without the assistance of the CJEU. Ideally, the doctrine of the SCC, which is mandatory for the Judiciary following Article 5(1) of the General Act of the Judiciary Branch, would contribute to the uniform interpretation of those constitutional rights which have a European nature.

If the SCC does not assume a leading role in the definition of the standards of protection of fundamental rights together with the CJEU, the judiciary will do it through the preliminary reference procedure. In fact, it has been remarked that the SCC decided to make the *Melloni* preliminary reference prior to the National High Court in order to avoid being left



behind in the judicial dialogue with the CJEU.<sup>53</sup> A culture of judicial responsibility for fundamental rights protection is already settled in Spain, as is a culture of the submission of preliminary references as a tool for the suitable implementation of EU law. What is lacking now is a culture of collaboration between the SCC and CJEU – something that is necessary for there to be a good relationship between the rights upheld in the Charter and those contained in the Constitution.<sup>54</sup> Although *Melloni* was a first step, it was not the turn of the screw that had been so long-awaited by the experts. The SCC still holds to its original interpretation of EU law conflicts: it is not the duty of the SCC to implement EU law, not even EU rights. The Charter rights have the same meaning for the SCC as do those of the ECHR. The rulings of the CJEU are at the same level as those of the ECtHR, even when EU law is applied by the Member States. Unfortunately, that is not what Article 51 of the Charter establishes.

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<sup>53</sup> Javier Díez-Hochleitner Rodríguez, *Cuestión prejudicial y política judicial*, in LA CUESTIÓN PREJUDICIAL EUROPEA, IV EUROPEAN INKLINGS 164, 169 (2014).

<sup>54</sup> “Furthermore, constitutional courts can put their privileged jurisdictions at the service of the Charter in order to reinforce the rights it enshrines in the domestic scene.” SARMIENTO, *supra* note 30, at 1300.

## The Supreme Court of the United Kingdom and Preliminary References to the European Court of Justice: An Opencast Constitutional Lab

By Alessia Fusco\*

### A. The Preliminary Reference as a “Litmus Test”

At the start of his paper *Keeping Their Heads Above Water? European Law in the House of Lords*,<sup>1</sup> Anthony Arnull reports a judgment delivered by Lord Denning in 1979, in the early days of the process of the United Kingdom’s European integration. It stated as follows:

[The] flowing tide of the Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much that we have to learn to become amphibious if we wish to keep our heads above water.<sup>2</sup>

Lord Denning made a similar remark in his judgment in *Bulmer v. Bollinger*,<sup>3</sup> which was a pivotal case in the dialogue between the United Kingdom (UK) and European systems.

At that time, the UK was taking its first cautious steps in the European Community, following the entry into force of the European Communities Act in 1972. Since then, much has changed: the participation of the UK in the life of the European Union (EU) has developed, and a dialogue between the British and European courts has become a very powerful feature of the European constitutional landscape and also the British context. It is no longer a dialogue that suggests a two-way process; instead, from the perspective of the

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<sup>1</sup> Anthony Arnull, *Keeping Their Heads Above Water? European Law in the House of Lords*, in *FROM HOUSE OF LORDS TO SUPREME COURT. JUDGES, JURISTS AND THE PROCESS OF JUDGING* 129 (James Lee ed., 2011).

<sup>2</sup> Lord Denning MR in *Shields v. E Coomes (Holdings) Ltd.* [1979] 1 All ER 456, 462.

<sup>3</sup> See *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14 (22 May 1974), <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1974/14.html&query=Bulmer+and+v+and+Bollinger+and+%281974%29&method=boolean>.

integration of the British national system into the EU system, it amounts to a relationship of cooperation.

In this light, a study of preliminary references under the UK system can be very informative. As it amounts to a link<sup>4</sup> between the domestic and European systems, it can act as the “litmus test” for dialogue between these two systems. For the UK in particular, it can tell us something about the frail relationship between the primacy of EU law and the principle of parliamentary sovereignty, which is “the very keystone of the law of the constitution,” as Dicey taught.<sup>5</sup> Since *Costa v. ENEL*,<sup>6</sup> the principle of the supremacy of EU law has been asserted, that is, domestic courts are bound to apply EU law. National law must give way to EU law. There is thus no doubt that the constitution that Dicey described no longer operates as it did. The “classic view of parliamentary sovereignty,”<sup>7</sup> that is “a unique feature and a result of the unwritten constitution,” belongs to the *tradition* of the British system. Nowadays, the constitutional arrangement of the UK is more problematic. Studying the preliminary reference procedure from the perspective of such a complex system offers a valid means of considering some crucial national debates.

The main purpose of this article is, accordingly, to verify whether the preliminary references sent by the Supreme Court of the United Kingdom (hereafter, UKSC) have provided a linkage between the European system and the national British system by securing the protection of rights. Studying this procedure can enable us to understand how the unwritten British constitution is developing.

The case law will be examined using two different approaches. First, a quantitative approach will be taken, with the intention of discerning any potential predominance of one particular issue regarding which the UKSC has considered it necessary to make a reference to the Court of Justice (CJEU). Second, a qualitative approach will be adopted, based on a study of the reasoning used by the two Courts in the records of preliminary references. The intersection between these two approaches will assist in understanding whether and how the dialogue between the two courts may assist in the integration of the UK into the EU. Nevertheless, it is important to note that this research cannot aim to provide definitive

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<sup>4</sup> “Le renvoi préjudiciel n’est pas un recours mais un mécanisme, une procédure. Il n’est pas demandé à la Cour de Justice de l’Union européenne de se prononcer sur un litige, ni *a fortiori* de le trancher, mais de “dire le droit.” Le renvoi préjudiciel institue un lien entre le juge national et le juge communautaire, un pont assurant un dialogue qui s’établit sur les bases d’une coopération constructive entre deux ordres juridictionnel saux fins d’assurer l’application uniforme du droit de l’Union sur l’ensemble de son territoire.” GEORGE VANDERSANDEN, *RENOI PREJUDICIEL EN DROIT EUROPEEN*, REPERTOIRE PRATIQUE DU DROIT BELGE 9 (2013).

<sup>5</sup> ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 72 (1885).

<sup>6</sup> Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

<sup>7</sup> See Pavlos Eleftheriadis, *Parliamentary Sovereignty and the Constitution*, 22/2 CANADIAN J. L. & JURISPRUDENCE, 267–90 (2009).

answers to such difficult questions, particularly in the light of the fact that the data analyzed forms part of the case law of a very young Court, the role of which is still evolving.

### **B. A Peculiar Referring Court: The Supreme Court of the United Kingdom**

Before starting our analysis, it is appropriate to consider the referring judge, the case law of which concerning preliminary references will be the object of this study. It is particularly important to explain *why* this focus was chosen.

In October 2009, the Appellate Committee of the House of Lords was replaced by the Supreme Court of the United Kingdom, as provided for under the Constitutional Reform Act of 2005. The UKSC inherited all of the powers previously vested in the House of Lords as the ultimate court of appeal. Along with its powers, it also inherited its limits, for example as to the power to conduct constitutional review of legislation. In its first judgment on a preliminary reference issued by the UKSC, in *Shirley McCarthy v. Secretary of State for the Home Department*, the CJEU took note of this transformation and referred to the national court as “the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom).”<sup>8</sup>

As the UKSC is one of the many UK courts that can make references to the CJEU, it is important to explain the reasons underpinning the choice to focus on the use of the preliminary reference procedure within this Court only. Of the various reasons which could be proposed, one must be excluded from the outset. It is necessary to start by engaging in an *actio ad excludendum*: The UKSC is not a constitutional court, because it does not have powers of constitutional review.<sup>9</sup> In actual fact, the nature and role of this Court is said to be “evolving.”<sup>10</sup> If we employ the traditional categories used in studies of constitutional courts in general, the only reason we can advance in support of the UKSC as a Constitutional Court does not concern the judicial review of legislation – as this power is not available in the UK – but jurisdiction over devolution issues (Government of Wales Act 1998, Scotland Act 1998, and Northern Ireland Act 1998). The UKSC acquired this jurisdiction from the Judicial Committee of the Privy Council. On the contrary, as regards the power of judicial review, many scholars consider that the UKSC does not have any such power. Paul Craig, for example, argues that:

in UK law, the principles of judicial review can be used to invalidate secondary norms and to interpret primary legislation, but they cannot be used to invalidate the

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<sup>8</sup> Case C–434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 2011 E.C.R. I–03375.

<sup>9</sup> PETER LEYLAND, *THE CONSTITUTION OF UNITED KINGDOM: A CONTEXTUAL ANALYSIS* 202 (2012).

<sup>10</sup> See Kate Maleson, *The Evolving Role of the UK Supreme Court*, PUBLIC LAW 754 (2011).

latter. This is true even in relation to rights-based review pursuant to the HRA 1998, since legislation that is incompatible with Convention rights is not invalidated, but is subject to a declaration of incompatibility that does not affect its legal status.<sup>11</sup>

He adds:

The mere fact that we have an unwritten constitution does not *per se* preclude principles of judicial review from being above primary legislation. It would be perfectly possible to imagine an unwritten constitution in which this was so. The rationale for the position in the UK is not because we have an unwritten constitution, but because its dominant principle is the sovereignty of Parliament, the corollary being that UK principles of judicial review may serve as interpretive guides concerning primary legislation, but cannot lead to its invalidation.<sup>12</sup>

Nevertheless, this Court performs a peculiar and controversial institutional role. Indeed, its name itself is very telling: as Maleson writes, “the cultural connotation of the title, particular given the long shadow of the US Supreme Court, is likely to impact physiologically in a way which affects both internal and external expectations of the role of the court.”<sup>13</sup> This is true with regard to the relationships with the CJEU.

First of all, the UKSC is a national Court of last resort: it is the final Court of appeal in the UK for civil cases and for criminal cases from England, Wales, and Northern Ireland. As a final court, it accepts the jurisdiction of the CJEU, under the duty imposed by Article 267 of the Treaty on the Functioning of the European Union (TFEU), to ask the CJEU to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union. Moreover, pursuant to Article 267(3) TFEU, it is a “[...] court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” and, therefore, it “shall bring the matter before the Court.”

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<sup>11</sup> Paul Craig, *Accountability and Judicial Review in the UK and EU: Central Precepts*, in ACCOUNTABILITY IN CONTEMPORARY CONSTITUTION 192 (Nicholas Bamforth and Peter Leyland eds., 2013).

<sup>12</sup> *Id.* at 193.

<sup>13</sup> MALLESON, *supra* note 10, at 771.

Secondly, as mentioned above, the UKSC is the designated successor to the Appellate Committee of the House of Lords, before which the dialogue between the UK and EU started to develop during the 1980s and 1990s through the proposition of certain preliminary rulings. These included, in particular, the famous decision in *R v. Secretary of State for Transport, ex parte Factortame (No 2)*.<sup>14</sup> This cannot be disregarded in any accurate account of the meaningful power of the preliminary reference procedure in the construction of the dialogue between the UK and EU, simply because, according to Drewry, it “has a special place in the political history of Britain’s love-hate relationship with the Community and the Union.”<sup>15</sup>

After the European Economic Community arranged for fishing quotas to be established for each Member State of the Community, the UK Parliament approved the Merchant Shipping Act in 1988. This Act sought to prevent foreign fishing companies from fishing in British waters, by prescribing certain rules governing the registration of the fishing boats as British boats. In fact, it only allowed fishing boats owned by British citizens or UK residents to trawl in national waters. The Spanish company Factortame had several fishing boats which could not be enrolled as British boats, even though they had been registered in the UK before the Act came into force. During the course of a complex legal procedure, three preliminary references were made to the CJEU, one of which was sent by the House of Lords. The House of Lords also made some important rulings, stating that the provisions of the Act had to be set aside as they were at odds with European Community law. This is the aspect which makes *R v. Secretary of State for Transport, ex parte Factortame (No. 2)* a pivotal case, and a point of no return for the UK in the European integration process. It marked a “sea-change in the attitude of the English courts to European law.”<sup>16</sup> From then on, the sovereignty of Parliament would not be the same.<sup>17</sup>

The effects which the dialogue among the domestic and European systems have produced at the judicial level on the core rationale of parliamentary sovereignty cannot be ignored.

On the website of the UK Parliament, we read a definition of parliamentary sovereignty which recalls Dicey and his *Introduction to the Study of the Law of Constitution*. Here it is:

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal

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<sup>14</sup> Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, 1990 E.C.R. I-02433.

<sup>15</sup> Gavin Drewry, *The Jurisprudence of British Euroscepticism: A Strange Story of Fish and Vegetables*, 3/2 UTRECHT L. REV. 105 (2007).

<sup>16</sup> ARNULL, *supra* note 1, at 137.

<sup>17</sup> See Paul Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 11 Y.B. EUR. L. (YEL) 221 (1991).

authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.<sup>18</sup>

In the relationship with the EU legal system, this means that the British Parliament can repeal the European Communities Act and similar subsequent legislation whenever it wishes. There is no doubt that this is a feature of parliamentary sovereignty. At the same time, however, judgments such as *Factortame* have taken on a constitutional status, which cannot be underestimated. From this perspective, “UK membership of the EU represents a significant qualification to the principle of parliamentary sovereignty.”<sup>19</sup> The preliminary reference procedure establishes both collaboration between the legal systems and a hierarchy.<sup>20</sup> It does not seem wrong to assert that this produces some important effects on the “classical view of parliamentary sovereignty.”<sup>21</sup>

### C. Preliminary References Sent by the UKSC: Some Aspects

We may now consider the general landscape of the preliminary references sent by the UKSC. Acting under Article 42 of the Supreme Court Rules 2009,<sup>22</sup> the UKSC has submitted

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<sup>18</sup> See [www.parliament.uk/about/how/sovereignty](http://www.parliament.uk/about/how/sovereignty).

<sup>19</sup> See LEYLAND, *supra* note 9, at 54.

<sup>20</sup> R. Romboli, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, in NUOVE STRATEGIE PER LO SVILUPPO DEMOCRATICO E L'INTEGRAZIONE POLITICA IN EUROPA 431 (Adriana Ciancio ed., 2014).

<sup>21</sup> ELEFTHERIADIS, *supra* note 7.

<sup>22</sup> Art. 42, Supreme Court Rules 2009: “(1) Where it is contended on an application for permission to appeal that it raises a question of Community law which should be the subject of a reference under Article 234 of the Treaty establishing the European Community and permission to appeal is refused, the panel of Justices will give brief reasons for its decision.”

(2) Where on an application for permission to appeal a panel of Justices decides to make a reference under Article 234 before determining the application, it will give consequential directions as to the form of the reference and the staying of the application (but it may if it thinks fit dispose of other parts of the application at once).

(3) Where at the hearing of an appeal the Court decides to make a reference under Article 234 it will give consequential directions as to the form of the reference and the staying of the appeal (but it may if it thinks fit dispose of other parts of the appeal at once).

(4) An order of the Court shall be prepared and sealed by the Registrar to record any decision made under this rule.”

a total of eleven preliminary references to the CJEU. One of these was struck from the register by the President of the Court.<sup>23</sup> All of the others cases were concluded.

If we attempt to distinguish these on the basis of the main subject-matter dealt with, some areas of law may be identified. The main subjects of the references are citizenship of the Union and right of entry and residence (*McCarthy* case<sup>24</sup>), approximation of laws (*Public Relations Consultants Association LTD.* and *David Edwards* cases<sup>25</sup>), social policy (*Williams and others*, *Alemo Herron* and *Saint Prix*, *O'Brien* cases<sup>26</sup>), freedom of establishment (*Test Claimants*<sup>27</sup>), and, lastly, the environment (*ClientEarth*<sup>28</sup>). In the cases of *Public Relations Consultants* and *David Edwards*, along with *Office of Communications*,<sup>29</sup> the main subject-matter of the approximation of laws concerned the area of information.

The analysis here must consider the criteria used in making referrals to the CJEU, the reasons for making the references, the legal reasoning, and any discernible patterns. When reading each of the judgments, the “reasons of the judgment” become clear. Several reasons are advanced: in some cases, parts of the Directives do not enable the national courts to understand clearly whether they are able to provide dynamic interpretations, as in *Alemo-Herron* case. Other cases concern some difficult issues of European law, for which the guidance of the CJEU is required (*ClientEarth* case). In general, references are made when various members of the Supreme Court hold different views on a question of European law (for instance, in the *Williams and others*, *Edwards*, *O'Brien*, *Office of*

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<sup>23</sup> Case C-54/11, JP Morgan Chase Bank and J.P. Morgan Securities (July 5, 2011), <http://curia.europa.eu/>. In this case, the UKSC was sent a copy of the judgment of 12 May 2011 in Case C-144/10 *Berliner Verkehrsbetriebe*, 2011 E.C.R. I-03961 by the Registry of the Court. This asked the UKSC whether, considering that judgment, it wished to maintain its reference for a preliminary ruling. One month later, the UKSC informed the Court that it did not wish to maintain the reference.

<sup>24</sup> Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 2011 E.C.R. I-03375.

<sup>25</sup> Case C-360/13, *Public Relations Consultants Association LTD. v. The Newspaper Licensing Agency LTD.* (June 5, 2014), <http://curia.europa.eu/>; Case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency*, (Apr. 11, 2013), <http://curia.europa.eu/>.

<sup>26</sup> Case C-155/10, *Williams v. British Airways*, 2011 E.C.R. I-08409; Case C-426/11, *Alemo Herron v. Parkwood Leisure LTD.*, (July 18, 2013), <http://curia.europa.eu/>; Case C-507/12, *Saint Prix v. Secretary of State for Work and Pensions*, (June 19, 2014), <http://curia.europa.eu/>; Case C-393/10, *O'Brien v. Ministry of Justice*, (Mar. 1, 2012), <http://curia.europa.eu/>.

<sup>27</sup> Case C-362/12, *Test Claimants v. Commissioners*, (Dec. 12, 2013), <http://curia.europa.eu/>.

<sup>28</sup> Case C-404/13, *ClientEarth v. Secretary of State for the Environment, Food and Rural Affairs*, (Nov. 28, 2013), <http://curia.europa.eu/>.

<sup>29</sup> Case C-71/10, *Office of Communications v. The Information Commissioner*, 2011 E.C.R. I-07205; Case C-360/13, *Public Relations Consultants Association LTD. v. The Newspaper Licensing Agency LTD.*, (June 5, 2014), <http://curia.europa.eu/>; Case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency*, (Apr. 11, 2013), <http://curia.europa.eu/>.



*Communications, Public Relations* and *Saint Prix* cases). In some cases (for example, *Test Claimants*) the Court expressly says that “the matter is not acte clair”<sup>30</sup> and, for this reason, considers a reference to the CJEU as necessary. As the UKSC is a national court of last resort, it is obliged by Article 267 TFEU to refer questions to the CJEU, as noted above. Hence, on this view, the preliminary references made by the UKSC were necessary.

Rather than dealing with all eleven cases, I will choose some of them, selecting certain themes and providing some observations. I shall focus on two groups of preliminary references made by the UKSC. The first group concerns the nodal point of social policy (*Williams, Alemo-Herron, Saint-Prix* and *O’Brien* cases); the second concerns citizenship (*McCarthy* and *Saint-Prix* cases). I have selected one case for each group, namely the *Williams* and *McCarthy* cases.

#### **D. The UKSC References to the CJEU Concerning Social Policy: The *Williams* Case**

British legal culture is characterized by the lack of a catalogue of social rights. For this reason, social policy is a field which is always developing. Out of the preliminary references sent by the UKSC, four concern the area of social policy. I refer to the cases of *Williams v. British Airways*, *Alemo Herron v. Parkwood Leisure LTD*, *Saint Prix v. Secretary of State for Work and Pensions*, and *O’Brien v. Ministry of Justice*. Moving from the assumption that “the legal culture of each Member State has always a marked effect upon the approach judges take towards preliminary references,”<sup>31</sup> a study of these rulings can suggest how the dialogue between UKSC and CJEU has secured the implementation of social rights at the domestic level. Employment is the prominent issue within these cases.

I consider it important to deal with the first case referred to the Court in this area: *Williams and Others v. British Airways plc*. In 2009, Williams and 2,750 other petitioners, who were pilots employed by British Airways, sued the British carrier before the Employment Tribunal with a claim for holiday pay (“paid annual leave”). The dispute arose because the pilots asserted that they had been underpaid by the company. According to the main domestic rules on pilots’ employment, their remuneration was composed of three elements, namely a fixed annual sum and two supplementary payments which were dependent on the time spent flying and the time spent away from base. According to the pilots, these last two elements were not computed in their holiday pay. Both the Employment Tribunal and the Employment Appeal Tribunal found in favor of the workers. By contrast, the Court of Appeal held that the “paid annual leave” stands at a level of a “normal pay.” Ms. Williams and other claimants challenged this decision before the UKSC.

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<sup>30</sup> See Case C-77/83, *CILFIT v. Ministry of Health*, 1984 E.C.R. I-01257.

<sup>31</sup> Thomas de la Mare and Catherine Donnelly, *Preliminary rulings and EU Legal Integration: Evolution and Stasis*, in *THE EVOLUTION OF EU LAW* 363, 382 (Paul Craig & Grainne De Búrca eds., 2011).

In order to establish the correct meaning of the concept of “paid annual leave,” the Court needed to make five references to the CJEU.<sup>32</sup>

Ruling on the correct interpretation of the concept, the CJEU held that the EU provisions involved

must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot. It is for the national court to assess whether the various components comprising that worker’s total remuneration meet those criteria.<sup>33</sup>

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<sup>32</sup> “(1) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (i) to what, if any, extent does European law define or lay down any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (ii) to what, if any, extent may member states determine how such payments are to be calculated?

(2) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(3) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker’s “normal” pay?

Further, in the event of an affirmative answer to question (3)(a) or (b):

(4) Is the relevant measure or comparison: (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(5) How should “normal” or “comparable” pay be assessed in circumstances where: (a) a worker’s remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave?”

<sup>33</sup> Case C–155/10, *Williams v. British Airways*, 2011 E.C.R. I–08409, para. 31.

Following the CJEU's judgment, the UKSC remitted the claims to the Employment Tribunal in order for the relevant amount to be quantified. The core principle within the European directive was the correlation between the amount of pay and the period of work.

It should be noted that at the domestic level, this case was a kind of "primum movens," specifically in the civil aviation sector in which various claims were raised concerning the level of holiday pay. Moreover, the CJEU's decision gave rise to a debate on the need to reform national legislation in this area.<sup>34</sup>

### E. The Subject of Citizenship in the *McCarthy* Case

The *McCarthy* case focused on the interpretation of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

It is fitting to start by noting that the citizenship of the Union and the right of entry and residence are two crucial aspects of EU law. Indeed these themes lie at the heart of many of the references made by national courts to the CJEU, starting with the *Sala* case in 1996.<sup>35</sup> These rulings gave the CJEU the opportunity to act as a "constitutional adjudicator"<sup>36</sup> in drawing the "*ubi consistam*" of European citizenship.<sup>37</sup>

In the *McCarthy* case, EU law, if it was applied, would guarantee greater protection than domestic law. Shirley McCarthy was a woman with dual citizenship (British and Irish). The question was well-summarized in the opinion delivered by Advocate General Kokott:

Can a person who is a national of two Member States of the European Union but has always lived in only one of those two States rely upon European Union law ('EU law') against that State in order to obtain there a right

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<sup>34</sup> See Sophie Lalor-Harbord, Case-Comment: British Airways plc. v. Williams and Others [2012] UKSC 43, available at <http://uksblog.com/case-comment-british-airways-plc-v-williams-and-others-2012-uksfc-43/>.

<sup>35</sup> Case C-85/96, María Martínez Sala, 1998 E.C.R. I-02691. This and the other main citizenship cases (e.g. Case C-34/09, Zambrano, 2011 E.C.R. I-01177; Case C-256/11, Dereci, 2011 E.C.R. I-11315) are commented also by Michael Dougan, *The Bubble that burst: Exploring the legitimacy of the Case Law on the Free Movement of Union Citizens*, in JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE COURT OF JUSTICE 127 (Maurice Adams, Henri de Waele, Johan Meeusen, & Gert Straetmans eds., 2013).

<sup>36</sup> I borrow this expression from Andrea Biondi and Silvia Bartolini, *Recent Developments in Luxembourg: The Activities of the Court's in 2012*, 20 EUR. PUB. L. 1-14 (2014).

<sup>37</sup> Citizenship is the main subject of other preliminary references such as the cases referred to, *supra* note 35.

of residence for him or herself and in particular for his or her spouse?<sup>38</sup>

Reliance on EU law would have enabled Mrs. McCarthy's husband, a Jamaican citizen, to have a derivative right of residence based on his wife's position; on the contrary, domestic law did not allow this.<sup>39</sup> Thus, what was the correct interpretation of Articles 3(1) and 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States? Was Mrs. McCarthy able to obtain a residence permit for her and her husband?

Although she had dual citizenship, the fact that she had always resided in a Member State of which she was a national and had never exercised the right of free movement led the Court to hold that Directive 2004/38/EC could not be applied to the case. However, the Court made an observation with regard to the application of Article 21 TFEU on the freedom of circulation of EU citizens, stating that whilst it could not be applied in a situation like this,

the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.<sup>40</sup>

In the light of the UK system, this was a very meaningful assertion. The CJEU was expressly asserting that, if domestic law guaranteed a lower protection of the rights involved, EU law would have to be applied.

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<sup>38</sup> Opinion of Advocate General Kokott at para. 1, Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* (Nov. 25, 2010).

<sup>39</sup> UK Immigration rules provide that nationals of third countries who do not have leave to remain in the United Kingdom also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

<sup>40</sup> Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 2011 E.C.R. I-03375, para. 31.

## F. Conclusions: The Preliminary Reference and the Changing British Constitutional Landscape

As was noted at the beginning of this article, the working question for this contribution was one of verifying whether the preliminary references issued by the UKSC have enhanced integration between the European and national British systems by securing the protection of rights and the development of the unwritten British constitution.

Some considerations may now be proposed. On the one hand, it might appear that the only path open to the UKSC is that of the preliminary reference to the CJEU. On the other hand, the number of such preliminary references may be indicative of the fact that judicial dialogue between the UKSC and the CJEU is increasing. From a quantitative standpoint, it is telling to observe the considerable increase in the number of preliminary references issued by the UKSC to the CJEU—an increase especially noticeable when compared to the experience of the UKSC's predecessor, the House of Lords. It is possible that other factors, which cannot be considered here, may have played a role in this. Until 2013, the statistics illustrate the increased incidence of references: eleven preliminary references were issued by UKSC during four years of activity, as against forty by the House of Lords between 1973 and 2008.<sup>41</sup> On this view, this is a revealing statistic.

The thematic aspect is interesting too. Whilst social policy undisputedly dominated in both the preliminary references sent by the UKSC and the House of Lords, the UKSC has also made references to the CJEU concerning other important subjects, such as citizenship (as shown in the *McCarthy* case). Moving from the assumptions that the preliminary reference is “the primary indication of judicial support for European integration,”<sup>42</sup> both a quantitative approach and a qualitative one prove that the integration of the UK into the EU may be improved strictly on the judicial level, although this is threatened by British euroskepticism. Within this perspective, judicial dialogue, which has grown through increasing judicial activism, can reveal its power in the process of integration, in order to create an “interconstitutional” order.<sup>43</sup>

I have left it to the end to consider an element which may be useful in support of the argument made here. The UKSC did not make any references to the CJEU in 2014. I do not think there is any reason to state that the UK is shrinking back from the process of

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<sup>41</sup> ARNULL, *supra* note 1 (examining and taking stock of the preliminary references issued by the House of Lords).

<sup>42</sup> JONATHAN GOLUB, *Modelling Judicial Dialogue in the European Community: The Quantitative Basis of Preliminary References to the ECJ*, EUI Working Paper RSC No 96/58, 1.

<sup>43</sup> From this perspective, see Antonio Ruggeri, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all'adesione dell'Unione alla CEDU e all'entrata in vigore del Prot. 16)*, available at <http://www.rivistaaic.it/articolorivista/ragionando-sui-possibili-sviluppi-dei-rapporti-tra-le-corti-europee-e-i-giudici>.

European integration. Perhaps the adoption of a peremptory approach is not the right way to go about it. This statistic, if anything, allows us to consider how flexible the preliminary reference procedure is, as it is strongly dependent on the cases the Court has to judge on. The absence of rulings issued by the UKSC in 2014 is not a sufficient reason to conclude that “the United Kingdom will [not] continue to engage with Europe and European legal affairs.”<sup>44</sup>

In actual fact, within this scenario, the constitutional role of the UKSC is perhaps a chapter yet to be written. As has been shown, an unwritten constitution leaves greater scope for action by this young court. This will enable the rights guaranteed at the domestic level to be implemented through dialogue with the CJEU. Indeed, it is likely that it is precisely “in policing the constitutional boundaries of the United Kingdom”<sup>45</sup> that the UKSC could display and enhance its constitutional role.

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<sup>44</sup> See Lord Mance, *The Interface Between National and European Law*, 4 EUR. L. REV. 437, 456 (2013). He adds: “In whatever way the European Union may develop, I believe that the United Kingdom’s contributions on both the legislative and the legal scenes have been and can in future continue to be pre-eminent.”

<sup>45</sup> MALLESON, *supra* note 10, at 761.



## Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure

*By Aleksandra Kustra\**

### A. Constitutional Courts as Judges Under Article 267 TFEU

The main purpose of the preliminary ruling procedure is to prevent divergences in judicial decisions applying European Union (EU) law and to ensure the uniform interpretation of EU legal provisions across Member States. The procedure, introduced in the Founding Treaties,<sup>1</sup> has provided a platform for the Court of Justice of the European Union (hereafter, the ECJ or the CJEU) to deliver seminal judgments that have progressively defined the relationship between national and EU legal systems, among others. The procedure has also helped the ECJ to develop fundamental principles of EU law, including direct effect, indirect effect (i.e., the interpretation of national law in line with directives) and primacy.<sup>2</sup> Being one of the most important aspects of the EU judicial system, the procedure provided by Article 267 of the Treaty on the Functioning of the European Union (hereafter, TFEU) has had an immense impact on the harmonious development of EU law and the way in which national courts and EU courts interact and communicate.

The idea of ensuring the uniform application of EU law certainly influenced the ECJ in its adoption of a broad meaning of the term “court” under Article 267 TFEU. According to the settled jurisprudence of the CJEU, when determining whether the authority referring a preliminary question is a court within the meaning of Article 267 TFEU, the CJEU takes into account all the circumstances of the case, including in particular the legal basis for the existence of the judicial body, its permanent or temporary character, the mandatory nature of its jurisdiction, the adversarial type of proceedings, the application of the rules of law, and the principle of judicial independence.

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<sup>1</sup> Treaty instituting the European Coal and Steel Community, 23 July 1952, Art. 41, UNTS, vol. 261, 171 (ratified through 1952). Treaty establishing the European Economic Community, 1 January 1958, Art. 177, UNTS, vol. 294, 295, 296, 297, 298 (ratified through 1957).

<sup>2</sup> ANDREAS NORBERG, PRELIMINARY RULINGS AND THE CO-OPERATION BETWEEN NATIONAL AND EUROPEAN COURTS 16 (2006).



As regards the status of constitutional courts under Article 267 TFEU, the jurisprudence of the CJEU still lacks a clear statement that constitutional courts are, in principle, bound by the obligation to refer. The CJEU rather presumes that the jurisdiction and function of a body determine whether it can be considered as a court (and court of last resort) under Article 267 TFEU.<sup>3</sup> At the same time, the issue was twice considered in the ECJ Annual Reports, and it was also analyzed in several opinions of the Advocates General (hereafter, AG).

In the 1998 ECJ Annual Report, the view was expressed that there are good reasons to consider the admissibility of preliminary questions referred by constitutional courts.<sup>4</sup> This position was upheld in the 2002 ECJ Annual Report.<sup>5</sup> This time, however, the ECJ went even further and *explicitly* stated that constitutional courts are covered by the obligation imposed on national courts under the current Article 267(3) TFEU.<sup>6</sup>

As far as the Opinions of AGs are concerned, it is worth mentioning two of them, both delivered by AG Kokott. In her Opinion delivered on 2 July 2009 in *Presidente del Consiglio dei Ministri v. Regione Autonoma della Sardegna*, AG Kokott held that the reference by the Italian *Corte Costituzionale* was a good illustration of the fact that, also in proceedings before national constitutional courts, questions of EU law may arise that are decisive for the outcome of the constitutional dispute in question.<sup>7</sup> AG Kokott pointed out that EU law may be relevant to the decision in constitutional disputes where, among others factors, the purported effects of an EU law measure are at issue in constitutional law proceedings or where the scope left by an EU law measure for the national legislature is open to review by a constitutional court.<sup>8</sup> In another case, AG Kokott also considered the admissibility of the preliminary reference made by the Lithuanian Constitutional Court, and stated that constitutional courts also fall within the definition of 'court' for the purposes of the then Article 234 EC.<sup>9</sup> It is worth highlighting that the AG *implicitly* denied

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<sup>3</sup> See also the guidance provided by the ECJ on the preliminary reference procedure by national courts, *available at* [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106(01)&from=EN).

<sup>4</sup> See the text of the annual report, *available at* [http://curia.europa.eu/jcms/jcms/Jo2\\_11035/rapports-annuels](http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels). Proceedings of the Court of Justice in 1998 by Mr G.C. Rodríguez Iglesias, President 2–3.

<sup>5</sup> See the text of the annual report 8–9, *available at* [http://curia.europa.eu/jcms/jcms/Jo2\\_11035/rapports-annuels](http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels).

<sup>6</sup> Treaty on the Functioning of the European Union, 26 October 2012, Ex. Art. 177 and 234, OJEC, vol. 326, 141 and 164 [hereinafter TFEU].

<sup>7</sup> Opinion of Advocate General Kokott at para. 22, Case C–169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, 2009 E.C.R. I–10821.

<sup>8</sup> Opinion of Advocate General Kokott at para. 23, Case C–169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, 2009 E.C.R. I–10821.

<sup>9</sup> Opinion of Advocate General Kokott at para. 16, Case C–239/07, *Sabatauskas and Others*, 2008 E.C.R. I–07523.

the admissibility of a preliminary reference made during *a priori* review of a statute, by stating that the reference made by the Lithuanian Constitutional Court fulfilled all procedural requirements since it was made during the review of a statute which had already come into force.<sup>10</sup>

The CJEU criteria for a court (and court of last resort) under the current Article 267(3) TFEU and the Opinions of AGs in cases filed by constitutional courts prove that the CJEU supports such preliminary references. Nevertheless, only a few constitutional courts have referred to the CJEU so far.<sup>11</sup> The Polish Constitutional Tribunal (*Trybunał Konstytucyjny*; hereafter, the PCT) belongs to the majority of constitutional courts that have still not applied the preliminary reference procedure. May the PCT be considered as a court of last resort under Article 267(3) TFEU? The answer to this question depends on the PCT's jurisdiction and function. Therefore, before analyzing the present case law of the PCT concerning the preliminary procedure, the rudiments of the PCT's position in the Polish constitutional system need to be presented.

#### **B. The PCT's Position in the Context of the Preliminary Ruling Procedure**

The PCT's position in the political system is characterized by the principle of independence. According to Article 10(2) of the Constitution of 2 April 1997 (hereafter, the Polish Constitution or the Constitution), which states that judicial power shall be vested in courts and tribunals, the PCT is to be regarded as an organ of judicial authority. However, the distinction between courts and tribunals must be emphasized. Courts—and courts only—constitute the system of organs established to adjudicate in individual cases (“to implement the administration of justice,” according to the phrasing of Article 175(1) of the Constitution) and are subordinated—in a certain way—to the Supreme Court and the Supreme Administrative Court. The PCT (together with the Tribunal of State) remains outside the system of courts, thus constituting a separate branch of judicial power.<sup>12</sup>

The Polish Constitution recognizes four areas of the PCT's jurisdiction:

- (1) The review of norms (both abstract and specific; *a posteriori* and *a priori*); a particular procedure for reviewing norms is adjudicating on constitutional complaints;
- (2) Settling disputes over authority between the central constitutional organs of the State;

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<sup>10</sup> *Id.* at para. 18.

<sup>11</sup> See Aleksandra Kustra, *Sądy konstytucyjne a procedura prejudycjalna przed Trybunałem Sprawiedliwości Unii Europejskiej*, 4 PRZEGŁĄD SEIMOWY 78 (2012).

<sup>12</sup> See ZDZISŁAW CZESZEJKO-SOCHACKI, LESZEK GARLICKI, JANUSZ TRZCIŃSKI, *KOMENTARZ DO USTAWY O TRYBUNALE KONSTYTUCYJNYM* 6 (1999).

- (3) Deciding on the conformity with the Constitution of the purposes or activities of political parties;
- (4) Determining whether or not there exists an impediment to the exercise of office by the President of the Republic.<sup>13</sup>

Without any doubt, the primary function of the PCT is the control of hierarchical conformity of legal norms, and the eliminating of norms which are inconsistent with the system of law in force. The exclusive point of reference for such adjudication is the Constitution.<sup>14</sup>

The Polish constitutional system provides for both *a priori* review (review of preventive nature) and *a posteriori* review (which refers to such normative acts that are already enacted, are in force, or are still in the *vacatio legis* period). However, it clearly assigns priority to *a posteriori* review. Only exceptionally may the review of norms be conducted *a priori*, and the only subject entitled to initiate such a review is the President of the Republic. By contrast, the right to initiate the proceedings under the abstract review procedure is vested in a fairly wide range of subjects.

We can also distinguish between a universal and a particular initiative. The universal (general) initiative permits the questioning of the constitutionality of every normative act, regardless of whether the content of this act is related to the scope of activity of the applicant. This right belongs to numerous State organs (the President, the Marshals of the Sejm and the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor General, the President of the Supreme Chamber of Control, and the Commissioner for Citizens' Rights) and the parliamentary opposition (a group of 50 Deputies or 30 Senators).

The particular initiative permits the questioning of those acts or norms that relate to matters within the scope of activity of the applicant. The right to a particular initiative belongs to: the National Council of the Judiciary to the extent to which the questioned acts relate to the independence of courts and judges; the constitutive organs of units of local government; the national organs of trade unions, as well as the national authorities of employers' organizations and occupational organizations; and churches and religious organizations.

The concrete review may be initiated in two ways. The first is the consequence of the right of all courts to refer a question of law to the PCT. In order to submit a question, a

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<sup>13</sup> See KRZYSZTOF WOJTYCZEK, *SĄDOWNICTWO KONSTITUCYJNE W POLSCE. WYBRANE ZAGADNIENIA* (2013).

<sup>14</sup> See PIOTRA TULEJA, *STOSOWANIE KONSTITUCJI RP W ŚWIELE ZASADY JEJ NADRZĘDNOŚCI (WYBRANE PROBLEMY)* (2003).

court must be doubtful as to the conformity with the Constitution of a legal norm on which its decision is to be based. The court referring such a question to the Tribunal shall suspend the proceedings in the case to which the question relates, so that the decision can be based on the judgment of the PCT.

Constitutional complaint in Poland is another form of initiating a concrete review before the PCT, since an allegation can only be based on the unconstitutionality of a normative act upon the basis of which a final decision infringing the constitutional freedoms or rights of a complainant was passed.

The catalogue of norms under review, at least for the abstract review proceedings, is listed in Article 188 of the Constitution. This submits three types of acts to the PCT's review: statutes, international agreements, and legal provisions issued by central State organs.

As to the effects of PCT judgments, it should be highlighted that they may not be appealed against and have an *erga omnes* effect (i.e., they are binding on all addressees). Under the Polish system of constitutional review, as a rule, the loss of the binding force of the reviewed unconstitutional act takes effect on the day of the publication of the PCT's judgment. However, the PCT may specify another date for the end of the binding force of a normative act (the *pro futuro* effect of the judgment). Such a period may not exceed 18 months in relation to a statute, or 12 months in relation to any other normative act (Article 190(3) of the Constitution).<sup>15</sup>

### **C. The PCT Case Law Concerning the Preliminary Ruling Procedure and the Obligation to Refer Under Article 267(3) TFEU**

#### *I. Accession Treaty Judgment – General Acceptance of the Duty to Refer Under Article 267(3) TFEU*

All the rudimentary information regarding the PCT's position in the political system of Poland suggests that the PCT should consider itself as a court of last resort under Article 267(3) TFEU.

The PCT was aware of this fact, and just a few days after Poland's accession to the EU, it decided on its status under Article 267 TFEU. In a judgment of 11 May 2005, K 18/04 concerning the constitutionality of the Accession Treaty (hereafter, the *Accession Treaty*

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<sup>15</sup> See MONIKA FLORCZAK-WĄTOR, ORZECZENIA TRYBUNAŁU KONSTYTUCYJNEGO I ICH SKUTKI PRAWNE (2006); Katarzyna Gonera, Ewa Łętowska, *Artykuł 190 Konstytucji i jego konsekwencje w praktyce sądowej* 9 PAŃSTWO I PRAWO (2003).

judgment), the PCT accepted the obligation to make a preliminary reference to the ECJ, at least when performing a constitutional review of legislation.

As the *Accession Treaty* judgment still remains the most comprehensive one delivered on the status of EU law in the Polish legal system, it is worth briefly presenting several salient statements from the *Treaty* which have had an impact on the PCT's considerations concerning the preliminary ruling procedure.<sup>16</sup>

In the *Accession Treaty* judgment, the PCT decided that Poland's accession to the EU did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Polish State. The process of European integration, connected with the delegation of competences to EU organs in relation to certain matters, has its basis in the Constitution (Article 90<sup>17</sup>), as the mechanism for Poland's accession to the EU finds its express grounds in constitutional regulation and the validity and efficacy of the integration are dependent upon the fulfilment of constitutional elements of the integration procedure, including the delegation of the competences. The PCT highlighted that none of the constitutional provisions authorize the delegation to the EU of the competence to issue legal acts or to take decisions contrary to the Polish constitution, which is the supreme law of the Republic of Poland (Article 8(1) of the Polish Constitution). Concomitantly, the Constitution does not authorize the delegation of powers to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State.

Regarding the status of the *Accession Treaty*, the PCT held that the precedence over statutes of the application of international agreements which were ratified on the basis of

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<sup>16</sup> See Jan Barcz, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 169 (2005); Stanisław Biernat, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 185 (2005); Władysław Czapliński, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 207 (2005); Anna Wyrozumska, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 223 (2005); Krzysztof Wójtowicz, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 6 PRZEGLĄD SEJMOVY 190 (2005).

<sup>17</sup> "(1) The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

(2) A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

(3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

(4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies."

statutory authorization or consent granted via the procedure of a nationwide referendum (procedures provided for in Article 90 and Article 91 of the Constitution<sup>18</sup>), in no way signifies an analogous precedence of these agreements over the Constitution.

Furthermore, the PCT claimed that the concept and model of EU law created a new situation wherein, within each Member State, autonomous legal orders coexist and are simultaneously operative. Their interaction may not be described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law.

Considering the role of the ECJ in the EU legal order, the PCT pointed out that the ECJ is the primary, but not sole, depositary of powers as regards the application of the Treaties within the EU legal system. The PCT highlighted that the interpretation of EU law performed by the ECJ should fall within the scope of functions and competences delegated to the EU by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of mutual loyalty between the EU institutions and the Member States. According to the PCT, this assumption generates a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty on the Member States to respect EU norms.

In the context of the main topic of this paper, it is worth mentioning that one of the constitutional issues discussed in the *Accession Treaty* judgment was the compliance of the preliminary ruling procedure itself (in general) with the Polish constitution. The initiators of the proceedings before the PCT (a group of Deputies from the Sejm) more than any other group claimed that the obligation to refer to the ECJ limits the judicial independence in an unconstitutional way (Article 178(1) of the Constitution) and threatens the supremacy of the Polish Constitution (Article 8(1) of the Constitution).

The PCT decided that the principle of judicial independence (understood in such a way that judges are subject to the Constitution) also encompasses the duty to apply EU law (then Community law) binding upon Poland. According to the PCT, such a duty arises as a result of the ratification, in compliance with the Constitution and on the basis thereof, of the Founding Treaties of the EU. The PCT pointed out that the ECJ's competence to

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<sup>18</sup> Article 91: "(1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

(2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

(3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

declare a binding interpretation of EU law *via* the preliminary ruling procedure constitutes an element of the aforementioned Treaties and as such does not conflict with the constitutional principle of judicial independence nor does it threaten the supremacy of the Polish Constitution.

The PCT also stated further that the preliminary reference neither constitutes a threat to the PCT's competences determined in Article 188 (scope of jurisdiction in constitutional review proceedings) nor narrows them. Considering its status as a court under Article 267(3) TFEU (then Article 234 EC), the PCT claimed that if it decides to request a preliminary ruling concerning the validity or the content of EU Law, it would undertake this within the framework of exercising its adjudicative competences and only where, in accordance with the Constitution, it ought to apply Community law.<sup>19</sup>

Such a statement suggests that the PCT considered itself to be obliged to refer to the ECJ in all kinds of constitutional review proceedings, whether they were *a priori* or *a posteriori* and either abstract or concrete review. It should also be noted that the PCT did not narrow the scope of hypothetical preliminary questions, which may concern both the interpretation as well as the validity of EU law. However, some reservations are to be raised regarding an *ultra vires* review of EU law. Similarly to the standpoint of the German Federal Constitutional Court (*Bundesverfassungsgericht*; hereafter, the FCC) taken in numerous judicial decisions (from the *Maastricht* judgment onwards),<sup>20</sup> the PCT stated in the *Accession Treaty* judgment that because of the limited and conditional character of the conferral of EU competences, the PCT is authorized to perform an *ultra vires* review of EU acts. Nevertheless, unlike its German counterpart, the PCT seems to exclude the ECJ's judgments from the scope of this review. The PCT pointed out that the interpretation of EU law performed by the ECJ should fall within the scope of functions and competences delegated to the EU by its Member States, should be consistent with the principle of subsidiarity, and should be based upon the assumption of loyal cooperation (Article 4(3) TEU) between EU institutions and Member States. In the *Accession Treaty* judgment, the PCT highlighted that these reservations generate a duty for the ECJ to be sympathetically disposed towards national legal systems and a duty for the Member States to show the highest standard of respect for EU norms. Nevertheless, at the same time the PCT claimed that the direct review of the conformity of particular decisions of the ECJ with the Constitution does not fall within the PCT's scope of jurisdiction (Article 188 of the Constitution).<sup>21</sup>

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<sup>19</sup> Point 11.1. of the judgment.

<sup>20</sup> See Mehrdad Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48.1 COMMON MKT. L. REV. 9–38 (2011).

<sup>21</sup> Pursuant to Art. 188 of the Polish Constitution: "The Constitutional Tribunal shall adjudicate regarding the following matters:

*II. Act on Excise Duty Decision—The PCT's Isolationist Strategy and its Possible Consequences as Regards Preliminary Reference in Cases Initiated in Concrete Review Proceedings*

Another reservation concerning the PCT's hypothetical reference to the ECJ can be raised on account of the decision of 19 December 2006, case P 37/05 (hereafter, the *Act on excise duty* decision). The proceedings, which were initiated by the question of law referred by the Regional Administrative Court in Olsztyn, concerned the compliance of a statutory provision (the Act on excise duty<sup>22</sup>) with Article 90 EC (and Article 91 of the Polish Constitution, which in paragraph 2 guarantees international agreements ratified upon prior consent granted by statute a precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes). The PCT declined jurisdiction to answer this question of law and ruled that the issue at stake concerned the interpretation of EU law, and as such fell within the ECJ's jurisdiction.<sup>23</sup> The PCT highlighted the autonomy of the EU judicial system and the principles of judicial cooperation with national courts and held that the preliminary ruling procedure constitutes a fundamental mechanism of such judicial cooperation. The PCT decided that there was no need to refer questions of law regarding the conformity of domestic law with EU law to the PCT. The issue of solving conflicts in relation to domestic statutes falls outside the scope of the jurisdiction of the PCT, since the decisions on whether a statute remains in conflict with EU law shall be delivered by Polish courts (the Supreme Court, administrative courts, and common courts), while the interpretation of EU law shall be delivered by the ECJ by way of preliminary rulings.<sup>24</sup>

What is significant for the issue of the PCT's hypothetical use of the preliminary ruling procedure is the fact that the case was initiated by a court in concrete review proceedings. Therefore, the question may be raised as to whether, in the *Act on excise duty* decision, the PCT did not narrow the acceptance of its status as a court under the

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1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; 4) the conformity to the Constitution of the purposes or activities of political parties; 5) complaints concerning constitutional infringements, as specified in Article 79, para. 1."

<sup>22</sup> The Act of 23 January 2004 on excise duty (Journal of Laws (Dz.U.) No. 29, item 257, as amended).

<sup>23</sup> See also Adam Lazowski, *Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Court and the Court of Justice*, 4 EUR. CONST. L. REV. 187–97 (2008).

<sup>24</sup> See Bolesław Banaszkiewicz, *Głos do postanowienia Trybunału Konstytucyjnego z 19 grudnia 2006 r., P 37/05 (problem kontroli zgodności polskiej ustawy z prawem wspólnotowym)*, 2 PRZEGŁĄD LEGISLACYJNY 108 (2007); Anna Wyrozumska, *Stosowanie prawa wspólnotowego a art. 91, 188 i 193 Konstytucji RP*, 3 EUROPEJSKI PRZEGŁĄD SĄDOWY 39 (2007).



current Article 267(3) TFEU to being a court only able to engage in abstract review proceedings, similarly to the standpoint made by the Italian Constitutional Court (*Corte Costituzionale*; hereafter, the ICC) in the first reference to the ECJ (order No. 103/2008 of 13 February 2008).<sup>25</sup> However, in 2013 the ICC significantly changed its position and also referred to the ECJ in abstract review proceedings (Order No. 207/2013 of 23 July 2013).<sup>26</sup> If the *Act on excise duty* decision was made on the basis of assumptions analogous to those accepted by the ICC, it would mean that the PCT presumes that in concrete review proceedings there is always a judge *a quo* whose obligation is to ensure the effective application of EU law in the national legal system. If there is a domestic judge who is obliged or entitled (depending on the existence of a judicial remedy against its decisions) to refer to the ECJ, the PCT is not a court within the meaning of Article 267(3) TFEU in such proceedings.<sup>27</sup> Yet, this is only one of many possible interpretations of the *Act on excise duty* decision. The aforementioned interpretation is pillared by several theses expressed by the PCT. Firstly, the PCT accentuated the European mandate of national courts,<sup>28</sup> as it held that the domestic (ordinary and administrative) courts are the primary judicial bodies responsible for the correct application of EU law in Poland. This was pointed out by the PCT, when it held that the issue of solving conflicts between EU law and domestic statutes falls outside the scope of jurisdiction of the PCT, since the decisions on whether the statute remains in conflict with EU law are to be delivered by the Supreme Court, administrative courts, and common courts, while the interpretation of EU law norms is to be provided by the ECJ by way of a preliminary ruling.

The second thesis which assists the proposed interpretation of the PCT's decision is the adoption of the "isolationist strategy" toward the ECJ. As the PCT indicated, this point was

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<sup>25</sup> See Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are We in the Mood for Dialogue?*, TILSBURG INSTITUTE OF COMPARATIVE AND TRANSNATIONAL LAW WORKING PAPER 11 (2009/10), available at <https://ssrn.com/abstract=1483664>. Further on the issue of the ICC's previous case-law concerning the preliminary ruling procedure, see Marco Dani, *Tracking Judicial Dialogue—The Scope for preliminary Rulings from the Italian Constitutional Court*, 10 THE JEAN MONNET WORKING PAPER 5–12 (2008), available at [www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org).

<sup>26</sup> See Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ('Incidentier') Proceeding*, 14 EUR. PUB. L., 633–46 (2014); Ugo Adamo, *Nel dialogo con la Corte di giustizia la Corte costituzionale è un organo giurisdizionale nazionale anche nel giudizio in via incidentale. Note a caldo sull'ord. N. 207/2013*, 1 RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (2014); Adelina Adinolfi, *Una «rivoluzione silenziosa»: il primo rinvio pregiudiziale della Corte costituzionale italiana in un procedimento incidentale di legittimità costituzionale*, 4 RIVISTA DI DIRITTO INTERNAZIONALE (2013).

<sup>27</sup> On the disadvantages of such a concept in the Italian legal system, see MARTA CARTABIA, JOSEPH H.H. WEILER, *L'ITALIA IN EUROPA, PROFILI ISTITUZIONALI E COSTITUZIONALI* 196–97 (2000).

<sup>28</sup> See Michal Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts* in CONSTITUTIONAL CONVERSATIONS IN EUROPE 287–308 (Maartje de Visser & Catherine Van De Heyning eds., 2012).

made to eliminate any potential overlap between the PCT and the ECJ's jurisdiction followed by concurrent rulings on the same legal issues, as well as to prevent any dysfunction appearing in relations between the EU and Polish legal orders. The PCT highlighted that the ECJ and the PCT may not be juxtaposed as courts competing with each other and stated that "it is essential to indicate the different roles of both courts" (although it did not discuss this further).<sup>29</sup> In the *Act on excise duty* decision, the PCT also remarked that even the adoption of the 'isolationist doctrine' does not guarantee that no clash will occur between the ECJ and the PCT judgments. Moreover, the PCT held that it shall retain its status of the "last word" court on fundamental issues relating to the constitutional system of the State. This thesis suggests that the PCT will be rather cautious in referring to the ECJ. Taking into account the recent FCC decision of 14 January 2014, which issued a first preliminary reference concerned the validity and not the interpretation of EU law, it may be claimed that the PCT might also make use of the preliminary reference tool not only to serve as evidence of friendliness towards the ECJ but also as a warning.<sup>30</sup> However, as A. Lazowski rightly points out, the PCT fails to define in the decision matters of constitutional importance in which it reserves for itself the final word.<sup>31</sup> This makes the reservation vague and flexible.<sup>32</sup>

### *III. Supronowicz Judgment—The PCT Considers for the First Time the Duty to Refer With Regard to an Adjudicated Case*

The status of the PCT as "a court" under Article 267(3) TFEU was considered *in abstracto* in both the *Accession Treaty* judgment and the *Act on excise duty* decision.

The judgment of 16 November 2011 in the case SK 45/09 (hereafter, the *Supronowicz* judgment) has the opposite character. The case dealt with a constitutional complaint submitted by Ms. Anna Supronowicz. The facts of the constitutional complaint were as follows.

Ms. Supronowicz was convicted of an offence against the life and health of Mr. De Leeuw. As part of criminal proceedings pending against Ms. Supronowicz, the Court of Appeal in Brussels, in a decision of 23 December 2004, ordered Ms. Supronowicz to pay Mr. Jacques

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<sup>29</sup> This standpoint strongly resembles the position taken by the ICC in the *Granital* and *Mesagerazio Servizi* judgments, where the ICC strongly isolated itself from the application of the EU law and gave the floor to ordinary and administrative courts.

<sup>30</sup> The other constitutional courts which have raised preliminary questions concerning the validity of EU law are: the Belgian Constitutional Court, the Austrian Constitutional Tribunal, and the German Federal Constitutional Court.

<sup>31</sup> Similarly to, among others, the German Federal Constitutional Court (*ultra vires* doctrine and the constitutional identity review) and the ICC (*controlimiti* concept).

<sup>32</sup> See LAZOWSKI, *supra* note 21, at 194.

Andre De Leeuw the amount of EUR 12,500 as compensation for the material and moral damage which Mr. De Leeuw suffered. Both Ms. Supronowicz and the Belgian Public Prosecutor's Office lodged appeals against the judgment of the Criminal Court in Brussels and appellate proceedings were carried out. On 11 May 2006, Mr. De Leeuw requested the enforceability of the decision of the Belgian Court on the territory of Poland. Ms. Supronowicz lodged an appeal against the Polish court's declaration that the decision was enforceable. After an unsuccessful appeal against this ruling, Ms. Supronowicz submitted a constitutional complaint, in which she requested the determination of the unconstitutionality of several provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>33</sup> (principle of equality: Article 32, and right to a fair trial: Article 45 of the Polish Constitution).

The PCT followed the doctrine of "separate pools of cognition" adopted in the *Act on excise duty* decision and held that it is necessary to draw a distinction between examining the conformity of the acts of EU secondary legislation with the Treaties (i.e., the EU primary law), on the one hand, and examining their conformity with the Constitution, on the other. However, the *Supronowicz* judgment was the first case in which the PCT considered the necessity of making a preliminary reference regarding an adjudicated issue.

The judgment echoed all over Europe, as it was the first time since the *Solange I* judgment of the FCC in 1974 that a domestic constitutional court had dared to carry out a constitutional review of a Community regulation.<sup>34</sup> Nevertheless, it should also be highlighted that the controversial standpoint of the PCT was softened by the thesis expressed in the last part of the statement of reasons.

There, the PCT emphasized that it had reviewed the conformity of the EU's secondary legislation with the Constitution for the first time. Therefore, the issue of admissibility of a constitutional complaint was firstly determined, and then the PCT considered the issue of the substantial validity of the EU secondary legislation. Moreover, due to that new situation, the PCT decided to thoroughly examine the allegations, comparing the challenged EU provisions with the higher-level norms for the constitutional review, as indicated by the complainant. The PCT also noted that there was a need to determine, for the future, the manner of reviewing the constitutionality of the norm of EU law (the Treaties and secondary legislation) in the course of reviewing proceedings commenced by

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<sup>33</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. 1, as amended.

<sup>34</sup> See Piotr Bogdanowicz, Paweł Marcisz, *Szukając granic kontroli – glosa do wyroku TK z 16.11.2011 r. (SK 45/09)*, 9 EUROPEJSKI PRZEGLĄD SĄDOWY 47 (2012); Jan Galster, Agnieszka Knade-Plaskacz, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 r. (sygn. akt SK 45/09)*, 6 PRZEGLĄD SEJMOVY 131 (2012).

way of a constitutional complaint.<sup>35</sup> Repeating the formula known from the FCC decision in *Solange II*<sup>36</sup> and the judgment of the European Court of Human Rights (ECtHR) in *Bosphorus*,<sup>37</sup> the PCT decided that in the case of a constitutional complaint which challenges the conformity of a legal act of EU secondary legislation with the Constitution, the complainant is requested to prove that the challenged act causes a considerable decline in the standard of protection of rights and freedoms, by comparison with the standard of protection guaranteed by the Polish Constitution. Since then, this has become an essential element of the requirement to indicate the manner in which rights or freedoms have been infringed by the challenged EU legislative provisions.<sup>38</sup> According to the PCT, the need for this, more specific rendering, is justified by the character of the acts of EU law, which enjoy a special status in the Polish legal order and which come from legislative centers other than the organs of the Polish state. The PCT also emphasized that such a requirement follows the allocation of the burden of proof in review proceedings commenced by way of a constitutional complaint. However, this is not tantamount to possible indication (proof) that there has been an infringement of the Constitution, which is the task of the PCT.<sup>39</sup>

As regards the preliminary reference procedure, the PCT indicated in the *Supronowicz* judgment that Poland accepted the division of powers between the CJEU and the PCT with regard to the review of EU legal acts. The result of this division is the jurisdiction of the CJEU to provide the final interpretation of EU law and to determine the conformity of the acts of EU secondary legislation with the Treaties and the general principles of EU law. Consequently, the PCT emphasized the subsidiary character of its jurisdiction to examine the conformity of EU law (both primary and secondary) with the Constitution. The acknowledgement of the subsidiary character of such jurisdiction was followed by the statement that before adjudicating on the non-conformity of an act of EU secondary legislation with the Constitution, the PCT is obliged to consider the necessity of making a reference to the CJEU.<sup>40</sup> Although the case concerned the issue of the conformity of the Council Regulation with constitutional provisions, the PCT referred to hypothetical doubts regarding its compliance with EU primary law and held that in the adjudicated case there was no doubt as to the conformity of the challenged Council Regulation with EU primary

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<sup>35</sup> Point 8.2. of the judgment.

<sup>36</sup> Statement of the German FCC from 22 October 1986, sign. 2 BvR 197/83.

<sup>37</sup> *Bosphorus Airlines v. Ireland*, App. No. 45036/98, (Jan. 30, 2005), <http://hudoc.echr.coe.int/>.

<sup>38</sup> Point 8.5 of the judgment.

<sup>39</sup> Point 8.5 of the judgment.

<sup>40</sup> What is worth mentioning is that the PCT referred to the view presented by the German FCC in its judgment of 6 June 2010 in the case *Honeywell*.

law, and hence—within the meaning of the *Foto Frost* doctrine—there was no need to refer to the CJEU for a preliminary ruling.

The *Supronowicz* judgment clearly shows that the PCT acknowledged its status as “a court” under Article 267(3) TFEU in the constitutional complaint procedure (which is a form of concrete constitutional review in the Polish legal system). As well as this, the PCT suggested in this judgment that it may use the preliminary ruling procedure—similarly to the FCC—as a warning before declaring that the challenged EU law is unconstitutional. Moreover, in the context of the standard of review in the *Supronowicz* case (the right to a fair trial guaranteed in Article 45 of the Polish Constitution), it is worth pointing out that the PCT is not entitled to decide on constitutional complaints submitted against a final judgment—by a court of last resort—that contain the allegation that this court’s omission in raising a preliminary question to the CJEU infringed the complainant’s constitutional right to fair trial.<sup>41</sup> This results from the fact that in Poland, a constitutional complaint may be submitted only against a legal act, not a court’s judgment or an administrative decision.

#### D. Missed Opportunities?

I support the view that in the *Supronowicz* case the preliminary reference was needless. There were neither doubts concerning the validity of the EU Regulation nor its interpretation. Yet, when the missed opportunities are considered, it is worth analyzing the broader context of two PCT rulings: the judgment of 7 November 2007, K 18/06, which serves as an example of a lack of coherence between determining PCT and CJEU criteria of nondiscrimination, and the judgment of 10 December 2014 K 52/13, where the EU law perspective became inevitable within the PCT’s considerations regarding the effects of its ruling.

##### *1. Act on Income Tax Judgment in Light of the CJEU’s Judgment in the Filipiak Case*

As the evaluation of the judgment of 7 November 2007, K 18/06 (hereafter, the *Act on income tax* judgment) depends on the broader factual and legal context, it is worth briefly presenting the main facts of the *Filipiak* case.

Mr. Filipiak, a Polish citizen, was pursuing economic activity in the Netherlands as a partner in a partnership under Dutch law; the organizational structure of this partnership corresponded to that of a general partnership under Polish law. Pursuant to Article 3 of the Act of 26 July 1991 on income tax payable by natural persons (Journal of Laws of

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<sup>41</sup> See Markéta Navrátilová, *The Preliminary Ruling before Constitutional Courts*; Clelia Lacchi, *The Obligation of National Courts of Last Instance to Make a Reference For a Preliminary Ruling to the Court of Justice of the EU as a Constitutional Guarantee*, in this Special Issue.

2000, No 14, item 176; hereafter, the Act on income tax) Mr. Filipiak was subject to unlimited tax liability in Poland. However, in the Netherlands, he paid the social security and health insurance contributions required of him by Dutch legislation. In a letter of 28 June 2006, Mr. Filipiak requested from the director of the tax office of Nowy Tomyśl advice in writing on the scope and manner of application of tax law. In his request for that advice, Mr. Filipiak observed that the provisions of the Act on income tax did not allow him to deduct the social security contributions paid in the Netherlands from his basis of assessment, nor to reduce the tax by the amount of the health insurance contributions also paid in the Netherlands. He claimed that such provisions were discriminatory and, that being the case, that those provisions should be disregarded and EU law should be applied directly. With the decision of 2 August 2007, the director of the Nowy Tomyśl tax office replied to the request for advice and expressed the view that Mr. Filipiak's position was unfounded. The director stated that, pursuant to Article 26(1)(2) of the Act on income tax, the only contributions which could be deducted from the basis of assessment were those specified in the Act on social security and that, pursuant to Article 27b(1) of the Act on income tax, the only health insurance contributions which could be deducted from tax were those specified in the Law on publicly funded healthcare benefits. As the contributions paid under Dutch law did not satisfy the criteria laid down in those provisions, they could not be deducted in Poland from the basis of assessment and from income tax respectively. When this administrative decision was upheld, Mr. Filipiak brought an action against it before the Regional Administrative Court in Poznań on the grounds that they infringed, *inter alia*, Articles 26(1)(2) and 27b(1) of the Act on income tax, Article 39(2) EC, Article 3(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996<sup>42</sup> as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005<sup>43</sup> ('Regulation No 1408/71'), and various provisions of the Polish Constitution.

The Regional Administrative Court in Poznań took the view that the prerequisites for an infringement of the freedom of movement for workers provided for in Article 39 EC were not satisfied in the present case. The court stated in this regard that, since the applicant in the main proceedings was a businessman who was a member of a general partnership based in the Netherlands, he was self-employed and did not work on the orders or under the control of another person. He could not, therefore, be regarded as a "worker" within the meaning of Article 39 EC. The Regional Administrative Court in Poznań considered that it was essential to examine whether the provisions at issue were compatible with a provision which was not relied on by Mr. Filipiak, namely Article 43 EC, where the effect of those provisions is that a taxpayer who is subject to unlimited tax liability in Poland on

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<sup>42</sup> 1997 O.J. 1997 (L 28) 1.

<sup>43</sup> 2005 O.J. (L 117) 1.

the entirety of his income and who pursues economic activity in another Member State is not allowed to deduct from his basis of assessment the amount of the compulsory social security contributions paid in the Netherlands and is not allowed to reduce his income tax by the amount of the compulsory health insurance contributions also paid in the Netherlands, even though those contributions were not deducted from in that Member State.

What is crucial for further consideration is the fact that the PCT reviewed the provisions of the Act on income tax in the aforementioned *Act on income tax* judgment. The PCT ruled partial unconstitutionality of the challenged statutory provisions and held that they did not conform with the Constitution to the extent to which they do not allow a taxpayer who pursued economic activity in another Member State, and who paid in this Member State compulsory social security and health insurance contributions, to deduct them from income deriving from an activity pursued outside Poland and from the tax payable thereon, where those contributions were not deducted in the Member State in which that activity was pursued. Those provisions are not compatible with the principle of equality before the law laid down in Article 32 of the Constitution, in conjunction with the principle of social justice, set out in Article 2 of the Constitution.<sup>44</sup> Yet, in the same judgment, pursuant to Article 190(3) of the Constitution, the PCT decided to defer the date on which the provisions held to be unconstitutional would lose all binding force to a date other than that of the publication of the judgment, namely to 30 November 2008.<sup>45</sup>

The deferral of the *Act on income tax* judgment's effects had a direct impact on the Regional Administrative Court in Poznań's referral to the CJEU. The Regional Administrative Court in Poznań decided to refer two preliminary questions.

In the first one, it asked whether the first and second paragraphs of Article 43 EC must be construed as precluding the provisions of Article 26(1)(2) of the Act on income tax, under which the right to a reduction of the basis of assessment for income tax by the amount of compulsory social security contributions is restricted to contributions paid on the basis of provisions of national law. The Regional Administrative Court in Poznań asked also whether the provisions of Article 27b(1) of that Act, under which the right to a reduction

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<sup>44</sup> See also Adam Lazowski, *Half Full and Half Empty Glass: the Application of EU Law in Poland (2004-2010)*, 48 COMMON MKT. L. REV. 548 (2011); Adam Zalasinski, *Odliczenie dla celów podatkowych składek na ubezpieczenie społeczne i zdrowotne, zapłaconych za granicą. Glosa do wyroku TK z 7 listopada 2007 r. (K 18/06)*, 4 PRZEGŁĄD PODATKOWY 41 (2008).

<sup>45</sup> Pursuant to Art. 190(3) of the Polish Constitution: "A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers."

of income tax by the amount of compulsory health insurance contributions is restricted to contributions paid on the basis of the provisions of national law, in the case where a Polish national, who is subject to unlimited liability to tax in Poland on income taxed there, has paid in another Member State compulsory social security and health insurance contributions in respect of the economic activity pursued in that other State, and those contributions have not been deducted either from income or from tax in that other Member State.

The second question, which is of greater interest in the context of the relationship between constitutional courts and the CJEU, concerned the doubt as to whether the principle of the primacy of EU law must be construed as taking precedence over the provisions of the Polish Constitution in so far as the entry into force of a judgment of the PCT has been deferred on the basis of those provisions.

At this point, the issue of an alleged missed opportunity arises. The main question in this regard is: Could the PCT have prevented the appearance of the *Filipiak* case?

For a comprehensive answer, it is necessary to point out that the *Act on income tax* case before the PCT was initiated in abstract review proceedings, so there was no need to stick strictly to the separate fields of cognition doctrine adopted in the *Excise duty act* decision.

The Ombudsman (Commissioner for Citizens' Rights), as the applicant, argued that the challenged provision not only infringed the Constitution (Article 32) but also infringed EU law, and was especially inconsistent with the provision on free movement for workers (Article 45 TFEU; ex 39 and 48). Therefore, the PCT had the hypothetical possibility of making a reference to the CJEU asking for the interpretation of Article 45 TFEU.

As the main legal issue in this case concerned the conformity of the statutory provisions with the constitutional principle of equal treatment, the PCT was not obliged to refer to the CJEU. However, the PCT did not totally skirt around the EU law context of the constitutional issue. It held "single-handedly" that the freedom of movement of workers imposes an obligation of equal treatment and non-discrimination of workers who are nationals of one Member State and work in this State and those who are nationals of other EU Member States but work in the same Member State as the former group. Such an interpretation of Article 45 of the EC Treaty led the PCT to the conclusion that Article 45 of the EC Treaty did not regard the challenged provisions as regulating the relations between Poland and its citizens (taxpayers) working abroad. (On the other hand, it should be highlighted that the PCT added that by respecting the principle of EU-friendly interpretation of domestic law, it had to be stated that the challenged statutory provisions did not serve for the full effectiveness of EU law, especially of the freedom of movement of workers, since they might discourage Polish citizens from working in other EU Member States.)



In the *Filipiak* judgment, the ECJ adopted a different interpretation of Article 45 of the EC Treaty as it held that every taxpayer who is also resident in Poland (and not only Polish nationals) but pursues his economic activity within another EU Member State and pays into compulsory social security and health insurance schemes there, but is not able to either deduct them from the basis of assessment in Poland or to reduce the tax payable in Poland by the amount of these compulsory health insurance contributions, is treated in a discriminatory way when compared to every worker not resident in Poland but pursuing their economic activity in Poland.<sup>46</sup>

The *Filipiak* case proves that the “isolationist strategy” towards the ECJ, adopted by the PCT in the *Excise tax act* decision, does not always effectively eliminate all potential overlap between the PCT and ECJ jurisdictions. The juxtaposition of the PCT’s *Act on income tax* judgment and the ECJ’s *Filipiak* judgment shows concurrent interpretations of the principle of equality and of the freedom of movement of workers. Therefore, the PCT’s avoidance of “competitiveness of jurisdictions” paradoxically led to such competitiveness and probably had a significant impact on the Regional Administrative Court’s decision to refer to the ECJ in the *Filipiak* case.<sup>47</sup>

As regards the missed opportunities, the *Act on income tax* judgment serves as an example of a case where the PCT could have (at least) considered referral to the ECJ concerning the interpretation of Article 45 EC Treaty. Such a preliminary ruling could have allowed the avoidance of different perceptions of the similarity criterion by the PCT and the ECJ. Moreover, in such a scenario, the *Filipiak* case would not have appeared at all, since it was, among others factors, the lack of sufficient Europeanization of the constitutional principle of equality that arguably influenced the decision of the Regional Administrative Court in Poznań to refer to the ECJ.<sup>48</sup>

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<sup>46</sup> The ECJ concurred with the PCT’s view on the lack of differentiation of legal situation among Polish nationals working abroad. Concomitantly, it pointed out that what had to be compared was the situation of Polish nationals who resided in Poland and pursued their economic activity in Poland with the situation of Polish nationals who resided in Poland but pursued their economic activity in another Member State. According to the ECJ, the taxation of both groups should be conducted by applying the same rules of tax deduction. As a result, the Court, by answering to the first preliminary question, stated that provisions of Polish tax law violated the freedom of establishment and freedom to provide services under Arts. 43 and 49 of the EC Treaty. See Przemysław Mikłaszewicz, *Pytanie prejudycjalne do TS oparte na wadliwej wykładni prawa krajowego dokonanej przez sąd pytający (w kontekście wpływu odroczenia przez TK terminu utraty mocy obowiązującej niekonstytucyjnych przepisów krajowych na skuteczność prawa UE) – glosa do wyroku WSA w Poznaniu z 14.01.2010 r. (I SA/Po 1006/09)*, 10 EUROPEJSKI PRZEGLĄD SĄDOWY 41 (2011); Aleksandra Kustra, *Odroczenie przez TK mocy obowiązującej przepisu niezgodnego z prawem UE – glosa do wyroku TS z 19.11.2009 w sprawie C-314/08 Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, 6 EUROPEJSKI PRZEGLĄD SĄDOWY 34–40 (2012).

<sup>47</sup> KUSTRA, *supra* note 42, at 39–40.

<sup>48</sup> The decision of *Wojewódzki Sąd Administracyjny w Poznaniu* of 30 May 2008, signature I SA 1756/07.

On the other hand, the PCT's *Act on income tax* judgment can be also considered a thoughtful choice. Such an interpretation of this ruling is based on the assumption that the PCT decided to flag the autonomy of constitutional and EU standards of review even if they might have appeared to be legal equivalents. In the *Act on income tax* case, these standards had a different character, as the constitutional principle of equality and non-discriminatory treatment is considered as a constitutional right, whereas the Treaty provisions indicated by the applicant related to the four Community freedoms. Yet, taking into account the broader context of the ECJ's recent judgments regarding the application of the Charter in the domestic legal systems of the EU Member States (*Melloni*,<sup>49</sup> *Åkerberg*,<sup>50</sup> *Aliyev*<sup>51</sup>), the emphasis on the autonomy of the constitutional and EU law standards of review enhances the position of many constitutional courts, leaving them as the "last word courts" in the sphere of the protection of constitutional rights.<sup>52</sup>

## II. Ritual Slaughter Judgment in Light of its Effects

Another case that may be considered to be a missed opportunity to refer to the CJEU is the PCT's judgment of 10 December 2014, K 52/13, concerning an application filed by the Association of Jewish Religious Communities in the Republic of Poland with regard to the ban on ritual slaughter (hereafter, the *Ritual slaughter* judgment). In this judgment, the PCT decided that the lack of permission to subject animals to slaughter in a slaughterhouse in accordance with special methods prescribed by religious rites is inconsistent with the Constitution.

The initiator of the proceedings before the PCT claimed that an absolute ban, backed up by criminal sanctions, on the slaughter of animals in accordance with special methods prescribed by religious rites (usually referred to as "ritual slaughter"), did not conform with freedom of religion, guaranteed by Article 53 of the Constitution and Article 9 of the European Convention on Human Rights (ECHR).

The PCT determined that what had been challenged by the applicant was the absolute ban on ritual slaughter—in other words, a ban on carrying out ritual slaughter in a slaughterhouse, to which there were no exceptions. The said ban had been reinforced by

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<sup>49</sup> C-399/11, *Stefano Melloni v. Ministerio Fiscal* (February 26, 2013), <http://curia.europa.eu/>.

<sup>50</sup> C-617/10, Judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson* (February 26, 2013), <http://curia.europa.eu/>.

<sup>51</sup> Case C-112/13, *A v. B and Others*, (September 11, 2014), <http://curia.europa.eu/>

<sup>52</sup> Further on this issue, see Daniel Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9 EUR. CONST. L. REV. 391–419 (2013); Filippo Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson*, 9 EUR. CONST. L. REV. 315 (2013).

criminal sanctions. In that legal context, Article 9(2) of the Act of 20 February 1997 on relations between the State and Jewish Religious Communities in the Republic of Poland, which stipulated that those religious communities had the broadly defined task of “adhering to the practice of ritual slaughter,” might not alone be construed as a basis for carrying out the ritual slaughter required by Judaism. The PCT indicated that ritual slaughter carried out in a slaughterhouse was permissible pursuant to Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, which had been applied directly since 1 January 2013. However, the Council Regulation permitted EU Member States to maintain in place any national rules that were binding at the time of entry into force of the Regulation and that were aimed at ensuring more extensive protection of animal welfare during slaughter. These rules were the challenged regulations of the Animal Protection Act, which prohibited ritual slaughter.

The PCT considered whether ritual slaughter was subject to protection in the light of freedom of religion, which constituted a fundamental freedom of the individual. The obligation to respect freedom of religion was strictly related to the protection of the inherent and inalienable dignity of the person. The PCT stated that the guarantee of freedom of religion, provided in Article 53(1) and (2) of the Constitution, comprised the carrying out of any activities (practices, rites, or rituals) which were religious in character. That also included unusual religious activities, or even those that might be unpopular with a majority of the public. The constitutional protection also included ritual slaughter, which has been practiced for centuries by the followers of Judaism and Islam. Ritual slaughter was also subject to protection under Article 9 of the ECHR, which had been emphasized by the ECtHR.

The PCT decided that in light of the constitutional and ECHR standards of protection, an absolute ban on ritual slaughter, backed up by criminal sanctions, constituted a restriction of the freedom to manifest religion. However, as the freedom to manifest religion is not absolute in character and may be subject to statutory restrictions, the main constitutional issue to decide was whether this restriction met constitutional (and conventional) requirements (i.e., was proportionate). One of the main elements of the constitutional belief in proportionality in Poland is the necessity of the limitation. This means that the limitation is necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons.

The PCT decided that there was no link between the absolute ban on ritual slaughter and the necessity to protect any of the aforementioned constitutional values. The PCT highlighted that the lack of any risk to the safety and hygiene of food, as well as to the health of consumers, was confirmed by the fact that the carrying out of ritual slaughter in a slaughterhouse had been permitted by the rigorous provisions of Council Regulation (EC) No 1099/2009, as well as the hitherto practice of carrying out ritual slaughter, with regard to which such risks had not been pointed out. Moreover, the admissibility of ritual

slaughter remained inextricably linked to the obligation of competent state authorities to control adherence to numerous requirements for carrying out the said slaughter.

The PCT highlighted that although the introduction of the absolute ban on the slaughter of animals in a slaughterhouse was not necessary for the protection of health or morals, it reflected deep concern for the welfare of farmed animals at the time of slaughter. The introduction of the absolute ban on ritual slaughter had been proposed by numerous Polish and international organizations who were concerned with enhancing the protection of animals. The protection of animals, including farmed animals at the time of slaughter, was also embedded in constitutional axiology. However, the statement that a restriction on the freedom to manifest religion in the form of the absolute ban on ritual slaughter was not necessary for the protection of any categories of the public interest, as specified in Article 53(5) and Article 9(2) of the ECHR, entailed that the restriction did not meet the requirements set by the Constitution and the ECHR.

Due to the significance of the problem under discussion, the PCT also addressed the question of the effects of the judgment. It pointed out that as of the date of the publication of the judgment in the *Journal of Laws*, it would be permissible to subject animals to ritual slaughter in an appropriate slaughterhouse on the basis of Article 4(4) of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (hereafter, Council Regulation No 1099/2009). And here the doubts begin. Should (or at least could) the PCT have referred a preliminary question regarding the interpretation of this EU law provision?

Article 4 of Council Regulation No 1099/2009 regulates methods of stunning animals. Pursuant to Article 4(1),

Animals shall only be killed after stunning in accordance with the methods and specific requirements related to the application of those methods set out in Annex I. The loss of consciousness and sensibility shall be maintained until the death of the animal. The methods referred to in Annex I which do not result in instantaneous death (hereafter, simple stunning) shall be followed as quickly as possible by a procedure ensuring death such as bleeding, pithing, electrocution or prolonged exposure to anoxia.

Article 4(4) provides an exception from the rule introduced in Article 4(1). Pursuant to Article 4(4), "In the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse."

The general tone of the judgment suggests that the PCT decided that the challenged statutory provisions were not in conformity with the constitutional standards because

they did not provide for any exceptions regarding the manifestation of religion (which, according to the PCT, includes ritual slaughter). What remained outside the scope of adjudication was a number of matters, such as the end use of meat obtained through ritual slaughter, the possibility of limiting the scale of such slaughter, and the export of the meat obtained through the slaughter. Therefore, the PCT could have used the opportunity to make a reference to the CJEU regarding the scope of the exception provided for, namely the acceptance of the ritual slaughter carried out for export in light of recitals 4 and 18 of the preamble of Council Regulation No 1099/2009.<sup>53</sup> The answer could have shaped both the sentence of the judgment (providing for a partial unconstitutionality) and its effects (in a more detailed way delineating the future actions of the Polish legislator, who would be either obliged or merely entitled to introduce further restrictions on the ritual slaughter carried out in Poland). Nevertheless, the case cannot be considered as an obvious example of an omission in referring for a preliminary ruling. If anything, it is, rather, a missed opportunity to start a formal dialogue with the CJEU.

## E. Conclusions

Nowadays, EU law is increasingly becoming a benchmark in the process of constitutional adjudication. Constitutional courts have started to apply EU law more actively, as they recognize that “the isolationist doctrine” is not in their long-term interest.<sup>54</sup> They may refer to EU law in order to determine a “demarcation line” which separates the ECJ and constitutional courts’ fields of cognition, but they may also apply EU law while interpreting constitutional standards in compliance with EU law. This results from the fact that international law and EU law standards today heavily affect constitutional standards and sometimes determine their modification (elevation or diminution). The procedural cooperation with the ECJ in the form of preliminary references also helps constitutional courts to effectively defend their political position *vis-à-vis* national courts, which

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<sup>53</sup> “(4) Animal welfare is a Community value that is enshrined in the Protocol (No 33) on protection and welfare of animals annexed to the Treaty establishing the European Community (Protocol (No 33)). The protection of animals at the time of slaughter or killing is a matter of public concern that affects consumer attitudes towards agricultural products. In addition, improving the protection of animals at the time of slaughter contributes to higher meat quality and indirectly has a positive impact on occupational safety in slaughterhouses.”

“(18) Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union.”

<sup>54</sup> See Jan Komarek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 442 (2013).

sometimes use their "Community mandate" to weaken the constitutional courts' position.<sup>55</sup>

All these factors have caused the recently observed significant shifts in the jurisprudence of several constitutional courts concerning the application of the preliminary ruling procedure. The Spanish Constitutional Tribunal (2011), the French Constitutional Council (2013), and last but not least the FCC (2014), have all decided to refer to the ECJ their first preliminary questions. Another piece of evidence for the aforementioned jurisprudential shifts is the ICC's decision n. 207, dated 18 July 2013, in which the ICC, for the first time, made a reference to the ECJ in the context of an incidental proceeding (*via incidentale*).

With this trend in mind, it is quite likely that the PCT will also refer to the CJEU in the not too distant future. At the same time, there is still some doubt regarding the PCT's reservations concerning the scope of such an obligation and the judicial "missed opportunities." Therefore, the analysis of the PCT's present standpoint as regards the preliminary ruling procedure is like reading tea leaves. The future is still blurred. In the *Accession Treaty* judgment, the PCT accepted the obligation to make a reference to the ECJ, at least when performing constitutional review of legislation. Yet, in the *Act on excise duty* decision, the PCT suggested that it might not consider itself as a court within the meaning of Article 267(3) TFEU in concrete review proceedings, as in this type of proceedings there is always a judge *a quo* whose obligation is to ensure the effective application of EU law in the national legal system. On the other hand, in the *Supronowicz* judgment, the PCT acknowledged its status as "a court" under Article 267(3) TFEU in the constitutional complaint procedure (which is a form of concrete constitutional review in the Polish legal system). Two other judgments of the PCT—the *Act on income tax* judgment and the *Ritual slaughter* judgment—serve as examples of missed opportunities to refer. Thus, one thing is certain: the PCT is still looking for a "good case" to start the direct dialogue with the CJEU.

Postscript:

The PCT formulated its first reference for a preliminary ruling—with two questions – in the decision of 7 July 2015, case K 61/13.

The analysis of PCT judgments rendered in the *Accession Treaty* judgment (K 18/04) and the *Supronowicz* judgment (SK 45/09), as presented in this paper, leads to the conclusion that a reference for a preliminary ruling by the PCT may only occur if certain conditions are satisfied. Firstly, the PCT considered itself a "court" within the meaning of Article 267(3) TFEU but only in respect of discharging its primary duty, that is controlling the

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<sup>55</sup> Daniel Sarmiento, *Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law: Tribunal Constitutional*, 50 COMMON MKT. L. REV. 890 (2013).

hierarchical conformity of legal norms (as opposed to, e.g., resolving disputes over authority). Secondly, according to the PCT, such a reference may only be formulated in cases of the PCT applying EU law. The final issue that needed to be resolved—at least before the decision K 61/13 of 7 July 2015 was rendered—was the definition of what the PCT’s application of EU law means. Formerly, this condition could be interpreted in two ways: narrowly (EU law being the direct object or a benchmark for judicial review), or broadly (EU law as an element affecting the interpretation of domestic legal norms being reviewed or used as a benchmark).

The decision of 7 July 2015 proves that the PCT has adopted the broad interpretation of the meaning of “application of EU law.” The case which served as the basis for the reference for a preliminary ruling was heard by the PCT upon the Commissioner for Citizens Rights’ (Polish Ombudsman, hereafter: Commissioner) application for the declaration of several provisions of the Act of 11 March 2004 on the goods and services tax<sup>56</sup> (hereinafter, VAT Act).<sup>57</sup> The provisions challenged by the Commissioner determine which goods are taxed at a reduced VAT rate. The reduced rates of 5% and 8% may be applied only to publications that are published in print or on carriers (disks, tapes, etc.) but not to electronic publications, which are subject to the VAT rate of 23%. According to the Commissioner, such a differentiation in the levying of a tax on publications with the same relevant characteristics, namely identical content, violates the principle of tax equality. As the PCT noted in the statement of reasons in the decision of 7 July 2015, the provisions of the VAT Act challenged by the Commissioner implement Directive 2006/112/EC. Poland applies the base rate of VAT to deliveries of electronically provided books because of the requirement to adhere to EU law. The base rate is different from the reduced rate applied to books recorded on carriers.

The PCT held in the statement of reasons of the reference decision that as a court applying indirectly (through provisions of the VAT Act) norms of EU law (Directive 2006/112/EC) it is obliged, first and foremost, to request that the ECJ issue a preliminary ruling regarding the validity of Directive 2006/112/EC itself. This is necessary, the PCT argues, because a decision on the constitutionality of the VAT Act provisions challenged by the Commissioner depends on the ECJ ruling on the validity of the Directive.<sup>58</sup>

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<sup>56</sup> Journal of Laws of 2011, No. 177, item 1054, as amended.

<sup>57</sup> More precisely, the Commissioner applied for the declaration of Items 72, 73, 74 and 75 of Schedule 3 to the VAT Act read in conjunction with Article 41(2) VAT Act, and Items 32, 33, 34 and 35 of Schedule 10 to the VAT Act read in conjunction with Article 41(2) VAT Act, as incompatible with Article 32 of the Constitution read in conjunction with Articles 84 and 2 of the Constitution, to the extent these provisions excluded the application of reduced rates of VAT to digital books and other electronic publications.

<sup>58</sup> Cf. para. 3.1.2 of the decision’s statement of reasons.

What is important here is the fact that, as early as in its first reference for a preliminary ruling, the PCT decided to ask two questions on the validity—rather than interpretation—of EU law. These were the following:

(1) Is point (6) of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax<sup>59</sup> (hereinafter: Council Directive 2006/112/EC), in the wording amended by the provisions of Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax<sup>60</sup> (hereinafter: Council Directive 2009/47/CE) invalid because a material procedural requirement for consultation with the European Parliament was violated during the lawmaking process?

(2) Is Article 98(2) of Directive 2006/112/EC, read in conjunction with point (6) of Annex III thereto, invalid because it violates the principle of tax neutrality as far as the said article excludes the application of reduced tax rates to books published in a digital form and to other electronic publications?

The PCT decision of 7 July 2015 reinforces the visible tendency for constitutional courts to be increasingly more active in using the preliminary reference procedure. Still, this arguably poses a valid question: Is the case in respect of which the PCT decided, 11 years after Poland's accession to the EU, to make a reference for a preliminary ruling to the ECJ the basis for formulating jurisprudential arguments with far-reaching consequences for the entire EU legal system? Or is this case of secondary importance? Was it a "good case" to start the direct dialogue with the CJEU?

It remains to be seen whether the decision of 7 July 2015 will become a one-off gesture towards judicial dialogue, or instead the starting point of a jurisprudential strategy that puts stronger emphasis on a constitutional court's application of EU law.

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<sup>59</sup> 2006 O.J. (L 347) 1, as amended.

<sup>60</sup> 2009 O.J. (L 116) 18.



